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and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

ANNOUNCEMENT OF GENERAL PROGRAM TEST: QUOTA PREPROCESSING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces Customs plan to conduct a test to evaluate the effectiveness of a new operational procedure regarding the electronic processing of quota-class apparel merchandise. The tests will be conducted at ports located at New York/Newark and Los Angeles. The new procedure will allow certain quota entries to be processed prior to carrier arrival, thus reducing the quota processing time. This notice informs the public of the new procedure and eligibility requirements to participate in the test. Public comments concerning any aspect of the test are solicited.

EFFECTIVE DATES: Written comments regarding this notice must be received on or before August 24, 1998. This test will commence no earlier than August 24, 1998 and run for approximately a six month time period, with evaluations of the test occurring periodically.

ADDRESSES: Applications to participate in the prototype will be accepted prior to and throughout the prototype. Written comments regarding this notice or any aspect of this test should be addressed to Lori Bowers, U.S. Customs Service, QWG Team Leader, 1000 Second Ave., Suite 2100, Seattle, WA 98104–1020 or may be sent via E-mail to preprocessing@quota.customs.sprint.com. Applications should be sent to the prototype coordinator at any of the four following port(s) where the applicant wishes to submit quota entries for preprocessing:

1) Julian Velasquez, Port of Los Angeles, 300 S. Ferry St., Terminal Island, CA 90731;
2) Tony Piscitelli, Los Angeles International Airport, 11099 S. La Cienaga Blvd., Los Angeles, CA 90045;
3) Barry Goldberg, JFK Airport, JFK Building 77, Jamacia, NY 11430; and
4) John Lava, Ports of New York/Newark, 6 World Trade Center, New York, NY 10048.

FOR FURTHER INFORMATION CONTACT: Lori Bowers (206) 553–0452 or Bob Abels (202) 927–0001.

SUPPLEMENTARY INFORMATION:

I. Description of Proposed Test

The Concept of Quota Preprocessing

Many apparel importers have identified a need to reduce the processing time for quota entries. These importers state that the total processing time, as measured from carrier arrival to Customs release, for quota merchandise is longer than for non-quota merchandise. Normally, entry summary documentation for both quota and non-quota merchandise may be preliminarily reviewed by Customs before the arrival of the carrier. For quota-class merchandise, however, the importing carrier must have actually arrived within the port limits and either the estimated duties must have been deposited or a valid scheduled statement date must have been received by Customs via the Automated Broker Interface (ABI) before it is deemed that there has been presentation of the entry summary. Because quota priority and status are determined at the time of presentation, the preliminary review does not reduce the processing time for quota entries. This results in increased costs and delays in receipt of quota-class merchandise. To address this issue a multidiscipline work group, including members from the trade, was formed in partnership with the National Treasury Employees Union (NTEU). Using process improvement methodology, the Quota Processing Work Group (QWG) developed Quota Preprocessing—a new operational procedure regarding the processing of quota-class merchandise—as a solution to the problem.

Quota preprocessing will allow certain quota entries (discussed below) to be filed, reviewed for admissibility, and processed through Customs prior to arrival of the carrier, similar to the methods in which non-quota entries are presently processed. It is believed that such a change in procedures could reduce the processing time for quota entries.

The Quota Preprocessing test is designed to evaluate the effectiveness of this new operating procedure, so that any benefits of processing quota entries prior to carrier arrival can be verified. By prototyping the concept first, Customs can measure the benefits, receive input from the trade, and determine if any future changes are necessary before incorporating Quota Preprocessing into its standard procedures. Should the measurements support the anticipated benefits, action will be initiated to amend certain Customs regulations (see below) so that Quota Preprocessing can be incorporated into the design of Customs future computer system, ACE (Automated Commercial Environment).

The ports of New York/Newark (4701, 4601, 1001) and Los Angeles (2704, 2720) are the test locations for Quota Preprocessing. By prototyping the process first at these ports, Customs can assess whether or not Quota Preprocessing can achieve its stated objectives prior to expanding the process nationally.

Prototype Objectives

The goals of the prototype are:

1) To reduce the processing time of quota entries;
2) To process quota entries submitted as part of the preprocessing program in the same amount of time as non-quota entries;
3) To increase the quantity of quota entries released within one calendar day of the arrival of the carrier; and
4) To equalize the submission of quota entries over the five-day work week.

Description of the Prototype

Participants in the prototype may submit quota entries that meet the eligibility requirements specified below to Customs up to five days prior to vessel arrival or after wheels are up on air shipments. Quota entries to be preprocessed must be submitted to Customs during official business hours (*see*, § 101.6, Customs Regulations), and will be reviewed for admissibility and processed prior to the carrier's arrival.

Pursuant to Customs Modernization provisions in the North American Free Trade Agreement Implementation Act (the Act), Pub.L. 103–182, 107 Stat. 2057, 2170 (December 8, 1993), Customs amended its regulations, in part, to enable the Commissioner of Customs to conduct limited test programs/procedures designed to evaluate the effectiveness of new technology or operations procedures, which have as their goal the more efficient and effective processing of passengers, carriers, and merchandise. Section 101.9(a) of the Customs Regulations (19 CFR 101.9(a)) allows for such general testing. *See*, TD 95–21. This test concerns the processing of merchandise and is established pursuant to that regulatory provision. Public comments concerning any aspect of the prototype are solicited and Customs will review any comments timely received before implementing this test.

The test of Quota Preprocessing is scheduled to run for six months with the starting date targeted for approximately 30 days from the publication of this notice in the Federal Register. Once the test is underway, Customs will begin evaluating the test procedure, employing criteria designed to measure the effectiveness of the prototype.

II. Importer/Entry Eligibility Criteria

Only importers who currently import apparel through the ports of Los Angeles (2704/2740) and/or New York/Newark (1001/4601/4701) may participate in the prototype. Participants will not be permitted to alter their importing patterns in order to take advantage of Quota Preprocessing. During the prototype Customs will monitor import volumes for significant increases through the prototype ports.

Customs will only accept consumption entries of apparel merchandise subject to quota (type 02 and 07) for preprocessing which meet the following criteria:

1) The entry must be filed using the ABI;
2) Payment must be made electronically through the Automated Clearinghouse (ACH);

3) Arriving carriers must use the Automated Manifest System (AMS);

4) The quota category must be less than 85% full;

5) The entry must contain at least one line classifiable in Chapter 61 or 62 of the Harmonized Tariff Schedule of the United States (HTSUS); and

6) The entry must be submitted at the port of Los Angeles (2704/2720) or New York/Newark (1001/4601/4701).

If an importer submits a quota entry for Quota Preprocessing and it does not meet all of the above criteria the entry summary will be rejected back to the filer and may not be resubmitted to Customs until after the carrier has arrived. Upon arrival of the carrier, merchandise covered by a preprocessed entry will be released unless Customs decides to perform an examination. If an examination of the merchandise is necessary, the examination will occur during the port's regular inspectional hours.

Regulatory Provisions Affected

During the six-month test period of this operational procedure, the requirements regarding scheduling of ACH payment, quota status, submission of quota documents, and time of entry, found in §§ 24.25(c)(3), 132.11, 132.11a, 141.63 and 141.68 of the Customs Regulations, will be suspended at the affected ports.

Regarding the submission of an entry under this prototype, when the documents are filed *prior to arrival of the merchandise* the term "*time of entry*" shall be the time the merchandise arrives within the port limits. For purposes of this prototype, the term "time of presentation" shall be the time of delivery in proper form of the entry/entry summary for consumption for which a valid scheduled statement date for the estimated duties payable has been successfully received by Customs via the ABI. A valid scheduled statement date must be within 10 days of the estimated date of arrival of the merchandise.

III. Application

Importers that wish to participate in the Quota Preprocessing prototype must submit a written application that includes the following information:

1. The specific ports located at either New York/Newark or Los Angeles at which they intend to enter quota merchandise;

2. The importer of record number(s), including suffix(es), and a statement of the importer's/filer's electronic filing capabilities;

3. Names and addresses of any entry filers, including Customs brokers, who will be electronically filing entries at each port on behalf of the importer/participant; and

4. The total number of consumption quota entries (type 02 and 07) filed at each of the prototype ports during the preceding 12-month period and the estimated number of eligible entries expected to be filed at each designated port during the Quota Preprocessing prototype. If it is expected that a significantly higher number of eligible entries will be filed during the prototype than

were filed during the preceding 12 months, an explanation for the increase is necessary.

Customs will notify applicants in writing of their selection or non-selection in this prototype. If an applicant is denied participation, he/she may appeal in writing to the port director at the port which denied the application.

IV. Misconduct

A participant may be suspended from the Quota Preprocessing prototype and disqualified from any future phases of this prototype if involved in any of the following acts of misconduct:

1. Shifting the volume of imports clearing through the prototype port(s);
2. Continually overestimating the date of arrival;
3. Continually submitting ineligible entries, *i.e.*, the entry summary is non-ABI, the carrier is non-AMS, payment is not via ACH, and/or none of the merchandise is from HTSUS Chapter 61 or 62;
4. Submitting multiple requests for canceled entries;
5. Participating in any activity to circumvent quota or erroneously gain quota status; or
6. Failing to abide by the terms and conditions of this notice or applicable laws and regulations.

Participants subject to suspension will be notified in writing. Such notice will apprise the participant of the facts or conduct warranting suspension and the date on which the suspension will take effect.

Any decision proposing suspension of a participant may be appealed in writing to the local port director within 15 days of the decision date. Should the participant appeal the notice of proposed suspension, the participant should address the facts or conduct charges contained in the notice and state how he/she does or will achieve compliance. However, in the case of willfulness or where public health interests or safety are concerned, the suspension may be effective immediately. Further, Customs has the discretion to immediately suspend a prototype participant based on the determination that an unacceptable compliance risk exists. This suspension may be invoked at any time after acceptance in the prototype. In addition to being suspended, a participant may be subject to penalties, liquidated damages, and/or other administrative sanctions for such action.

V. Test Evaluation Criteria

Although by no means exclusive, the following evaluation criteria may be used by Customs to assess the merits of the test procedure:

1. Workload impact (workload shifts/volume, cycle times, etc.);
2. Policy and procedure accommodations;
3. System efficiency;
4. Operational efficiency; or
5. Other issues identified by public comment or by the participants.

Also, Customs may survey participants to validate the benefits of this prototype. Results of the test evaluations will be available at the conclusion of the prototype and will be made available to the public upon request.

Dated: July 20, 1998.

AUDREY ADAMS,
Acting Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, July 24, 1998 (63 FR 39929)]

COUNTRY OF ORIGIN MARKING RULES FOR TEXTILES AND TEXTILE PRODUCTS ADVANCED IN VALUE, IMPROVED IN CONDITION, OR ASSEMBLED ABROAD

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Proposed interpretation; extension of comment period.

SUMMARY: On June 15, 1998, a document was published in the Federal Register advising the public that Customs is proposing a new interpretation concerning the country of origin rules for certain imported textile and textile products. Customs proposed that 19 CFR 12.130(c) should not control for purposes of country of origin marking of textile and textile products, and that Chapter 98, Subchapter II, U.S. Note 2(a), Harmonized Tariff Schedule of the United States does not apply for country of origin marking purposes. The document solicited comments, requesting that comments be received on or before August 14, 1998. This notice extends the period of time within which interested members of the public may submit comments concerning the June 15 proposal. The comment period is being extended another 45 days.

DATES: Comments must be received on or before September 30, 1998.

ADDRESSES: Written comments may be addressed to, and inspected at, the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Monika Brenner, Special Classification and Marking Branch, Office of Regulations and Rulings, (202) 927–1675.

SUPPLEMENTARY INFORMATION:

BACKGROUND

A document was published in the Federal Register (63 FR 32697) on June 15, 1998, advising the public that Customs is proposing a new in-

terpretation concerning the country of origin rules for certain imported textile and textile products. Customs proposed that 19 CFR 12.130(c) should not control for purposes of country of origin marking of textile and textile products, and that Chapter 98, Subchapter II, U.S. Note 2(a), Harmonized Tariff Schedule of the United States does not apply for country of origin marking purposes. The document solicited comments, requesting that comments be received on or before August 14, 1998.

Customs has received a request to extend the comment period to allow interested parties to have more time to consider the proposal and to explore how the proposed changes may impact the FTC rules on "Made in USA". Customs believes the request for more time has merit. Accordingly, the period of time for submission of comments is being extended 45 days.

All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days at the address stated above.

Dated: July 20, 1998.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, July 24, 1998 (63 FR 39931)]

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts and refunds of Customs duties. For the quarter beginning July 1, 1998, the rates will be 7 percent for overpayments and 8 percent for underpayments. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 1998.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1200, extension 1349.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less, and fluctuate quarterly. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 98–32 (1998–25 IRB 4, dated June 22, 1998), the IRS determined that the rates of interest for the fourth quarter of fiscal year (FY) 1998 (the period of July 1—September 30, 1998) will be 7 percent for overpayments and 8 percent for underpayments. These interest rates are subject to change for the first quarter of FY–1999 (the period of October 1—December 31, 1998).

For the convenience of the importing public and Customs personnel the following list of Internal Revenue Service interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning Date	*Ending Date*	*Under-payments*	*Over-payments*
Before July	063075	6 %	6 %
070175	013176	9 %	9 %
020176	013178	7 %	7 %
020178	013180	6 %	6 %
020180	013182	12 %	12 %
020182	123182	20 %	20 %
010183	063083	16 %	16 %
070183	123184	11 %	11 %
010185	063085	13 %	13 %
070185	123185	11 %	11 %
010186	063086	10 %	10 %
070186	123186	9 %	9 %
010187	093087	9 %	8 %
100187	123187	10 %	9 %
010188	033188	11 %	10 %
040188	093088	10 %	9 %

Beginning Date	*Ending Date*	*Under-payments*	*Over-payments*
100188	033189	11 %	10 %
040189	093089	12 %	11 %
100189	033191	11 %	10 %
040191	123191	10 %	9 %
010192	033192	9 %	8 %
040192	093092	8 %	7 %
100192	063094	7 %	6 %
070194	093094	8 %	7 %
100194	033195	9 %	8 %
040195	063095	10 %	9 %
070195	033196	9 %	8 %
040196	063096	8 %	7 %
070196	033198	9 %	8 %
040198	093098	8%	7%

Dated: July 20, 1998.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

[Published in the Federal Register, July 24, 1998 (63 FR 39932)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 22, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF CORK AND RUBBER COMPOSITE GASKET MATERIAL

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of certain cork and rubber composite gasket material. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 4, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, International Agreements Staff, (202) 927–1475.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of certain cork and rubber composite gasket material.

In Headquarters Ruling Letter (HRL) 087392, dated August 6, 1992, composite material consisting of between 60 and 80 percent by weight rubber, with the remainder consisting of agglomerated cork, was classified in heading 4504, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "[A]gglomerated cork (with or without a binding substance) and articles of agglomerated cork," by application of GRI 1. In support of this classification, it was noted that the heading text described the subject material and the Explanatory Note to heading 4504 described agglomerated cork with a binder of vulcanized rubber. HRL 087392 is set forth in Attachment A to this document.

Upon further consideration of this matter, Customs has determined that the rubber component of the subject material is described by heading 4008, HTSUS, which provides for "[P]lates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber." As the subject material is described in equally specific terms by headings 4008 and 4504, HTSUS, classification is pursuant to a GRI 3(b) analysis.

It is noted that the rubber component is of greater weight and value than the cork component. Moreover, the rubber component contributes an important function to the material's end use as an automotive gasket. A gasket is a seal or packing used to make a pipe or other joint air- or fluid-tight. As vulcanized rubber is compressible, it enhances a gasket's ability to maintain a seal when joints compress or expand. Vulcanized rubber is also impermeable to gas and liquid, thereby contributing to a gasket's ability to maintain a seal. Based on the foregoing, Customs views the rubber component as imparting the essential character to the composite material. Accordingly, classification is proper in subheading 4008.21.0000, HTSUS.

Customs intends to modify that part of HRL 087392 that relates to the classification of the gasket material in order to reflect classification in subheading 4008.21.0000, HTSUS. Before taking this action, consideration will be given to any written comments timely received. The proposed ruling modifying HRL 087392 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 16, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, August 6, 1992.

CLA-2 CO:R:C:T 087392 GAH
Category: Classification
Tariff No. 4504, 8409

DISTRICT DIRECTOR
UNITED STATES CUSTOMS SERVICE
111 West Huron Street
Buffalo, NY 14202

ATTN: Senior Import Specialist, Mr. Ralph Perri, CST 164.

Re: Request for Internal Advice 15/90; Gaskets and gasket material; Cork; Rubber; Cork and rubber composite; Agglomerated cork; Parts of automobiles; Parts of machines; Parts of engines.

DEAR SIR:

This is in response to your request for internal advice dated February 21, 1990, regarding the tariff classification of cork and rubber gasket materials and gaskets.

Facts:

Two classes of merchandise are presented here: finished gaskets and gasket materials in sheet or strip form. Both are made of a cork and rubber composite material. The cork and rubber are combined in Portugal and formed into blocks. The blocks are shipped to Canada where the importer slices the large pieces into sheets or elongated strips. Some of the material is shipped into the United States in sheet or strip form; some is cut to final shape as gaskets and then imported.

The samples provided have a mottled appearance. Information provided by the importer indicates that both the weight and value of the material varies from 60 to 80% rubber and 40 to 20% cork.

The importer claims classification under the provisions for rubber, based on the assumption that the character of the product is conveyed by the rubber component. The port of entry, in a Notice of Entry (Customs Form (CF) 19), proposed to classify the goods under the provisions for agglomerated cork. Alternatively, the port suggested that both the rubber and cork components contributed equally to the character of the goods, and that classification should be made under that provision which occurs last in the nomenclature. In this case, that would be the provision for agglomerated cork. The importer then made this request for internal advice.

Issue:

Are the gasket materials properly classifiable as sheets of vulcanized rubber in heading 4008, HTSUSA, or as agglomerated cork in heading 4504, HTSUSA?

Law and Analysis:

Gasket materials

The instant merchandise is an article of a mixture of synthetic rubber and cork. At General Rule of Interpretation (GRI) 1, HTSUSA, classification is determined according to the terms of the headings and the relative legal notes. If such headings or notes are not dispositive of the proper classification, GRI 1 instructs that we apply the remaining GRIs, taken in order.

Applying GRI 1, two headings may be considered for the classification of the instant merchandise. Heading 4008 covers plates, sheets, strip * * * of vulcanized rubber. * * * Heading 4504 covers agglomerated cork (with or without a binding substance) and articles of agglomerated cork.

Heading 4008, providing for vulcanized rubber in numerous forms, may be descriptive of the gasket material. The rubber constituent from which the importer's products are made meets the definition for synthetic vulcanized rubber. Chapter 40, notes 1 and 4(a), and the Explanatory Notes (EN) at 578.

The importer claims that the other component, granulated cork, is merely a compounding substance used to fill the rubber, added to the rubber before vulcanization. Of course,

compounding agents are clearly allowed in synthetic unvulcanized rubber. Chapter 40 EN at 578. Vulcanized rubber combined with another substance, such as cork, may remain classifiable in that heading if the whole retains the essential character of rubber. EN at 590. Heading 4504 covers agglomerated cork (with or without a binding substance) and articles of agglomerated cork. Agglomerated cork is manufactured by agglomerating crushed, granulated or ground cork generally under heat and pressure with an added binding substance, e.g., unvulcanised rubber. EN at 649. This heading text expressly describes the precise mixture at issue here. There are no limits given in the nomenclature or EN for the amount of binder allowed in combination with the cork particles to meet the terms of heading 4504 as agglomerated cork.

The properties that allow a gasket material to perform properly are critical to the classification of this merchandise. A gasket provides a seal or cushion between, for example, two machinery parts so that fluids or gases do not escape at the joining of those parts. The technical properties of rubber and cork as used within the gasket material mixture must be evaluated.

The importer claims that cork does not provide attributes necessary for satisfactory performance of the gasket. We disagree. To the contrary, cork is a natural substance with unique properties due to its tiny, closely packed, 14-sided cell structure. Cork is even more compressible than rubber. Its cell structure will compress under pressure, and return to its original shape and size when that pressure is removed. Thus, cork counteracts rubber's tendency to yield under prolonged stress, and flow out the sides of the joint. In gasket applications, this trait is invaluable in preserving the integrity of the seal. Cork is highly resistant to oil and water. *See* 7 Kirk-Othmer Encyclopedia of Chemical Technology 110 (1979 ed.). Thus, notwithstanding its light weight, cork provides fundamental characteristics to the gasket.

The Explanatory Notes support the technical literature. Agglomerated cork retains most of natural cork's properties. EN at 649. In particular, cork is light, elastic, compressible, flexible, waterproof, rotproof, and does not conduct heat or sound. EN at 647. A binder may modify certain features of cork, especially specific gravity and tensile or crushing strength. EN at 649. Agglomerated cork of heading 4504 is used to make much the same range of products as natural cork, including washers and gaskets, and is preferred for building materials, for insulating and protecting hot water or steam piping, for lining petrol pipelines, and for expansion jointing in the construction industry. EN at 648–49.

The rubber, it is claimed, provides heat resistance, compressibility, and impermeability. The properties of the rubber are highly dependent on and modified by the materials with which the rubber is combined. *See generally*, 20 Kirk-Othmer 374–86 (1982 ed.). Heat resistance, compressibility, and impermeability are provided by the cork as well. Moreover, the EN for heading 4504 recognizes that agglomerated cork, while retaining the qualities of natural cork, may have certain of its qualities modified by the binding substance. In that instance, the whole remains classified in 4504.

Further, while the above qualities are present in both natural and agglomerated cork, two chief qualities of rubber have been severely modified by the presence of cork. Specifically, the mixture has none of the elastic recovery of uncompounded rubber. Also, as noted below, rubber's tendency to deform is greatly reduced or eliminated by cork's unique stability under pressure. The EN for heading 4008, although noting that it includes products of both vulcanized rubber and compounded rubber, does not list gaskets, washers or seals for machine parts as a common use for such materials.

It is claimed that rubber is more than a mere binder, and by the terms of the heading, the importer's gasket materials are not specifically described as agglomerated cork. We disagree. We recognize that a rubber binder may cause the enhancement of the properties of the product, but this does not defeat classification as agglomerated cork. It is implicit in the examples of binding substances given, such as plastics and tar, that those agents have inherent properties of their own. The key point is that they act in this case as a binding substance.

The manufacturer asserts that specifications for automotive gaskets indicate that specific combinations of cork and rubber gasket materials (generally having no less than 50% rubber by weight) are required to meet current automotive standards. A specific combination of cork and rubber may indeed be required for a given application. This is entirely consistent with classification as agglomerated cork. We believe the instant gasket materials are classifiable at GRI 1 as agglomerated cork of heading 4504.

Complete gaskets for automotive use

The port of entry proposed classifying the completed gaskets for engine use in heading 8409, HTSUSA, as parts of engines. The Legal Notes to Section XVI and to Chapter 84, HTSUSA do not exclude gaskets of agglomerated cork from classification in Chapter 84. The issue to resolve is whether the gaskets are covered more specifically as articles of agglomerated cork of heading 4504, or as parts suitable for use solely or principally with the engines of heading 8407 or 8408, providing for combustion engines.

Heading 4504 is not a more specific provision within the meaning of GRI 3(a). A provision for articles of a named material is a residual provision that is not sufficiently specific to exclude an article from classification as a part under the HTS. Thus, the agglomerated cork gaskets for use in combustion engines are classified as parts of engines in heading 8409.

Gaskets for automotive transmissions of heading 8708, on the other hand, are precluded from classification as articles of Section XVII, note 2(a), *see* the Section EN (III)(A), and therefore are classified as articles of agglomerated cork in subheading 4504.90.2000, gaskets.

Holding:

The merchandise imported in sheets or strips, including strip in roll form, consisting of cork and rubber combined in the manner described above, is classified in subheading 4504.10.1000, HTSUSA, as agglomerated cork, vulcanized sheets and slabs wholly of ground or pulverized cork and rubber. The associated rate of duty for this subheading is 3.7 percent *ad valorem*.

The material, imported as cut, completed gaskets made of the same material for use in automotive engines, is classified in subheading 8409.91.9190, HTSUSA, as parts suitable for use solely or principally with spark-ignition internal combustion piston engines, for vehicles of subheading 8701.20, or heading 8702, 8703 or 8704, other; or in subheading 8409.91.9990, if for compression-ignition internal combustion engines of heading 8408. The rate of duty associated with these subheadings is 3.1 percent *ad valorem*.

Finished gaskets of the above material for use in automotive transmissions are classified in subheading 4504.90.2000, gaskets, washers, and other seals, with a duty rate of 18%. Under the terms of the Canadian Free Trade Agreement, the above merchandise may be eligible for entry at a reduced rate of duty.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:IA 004449 SK
Category: Classification
Tariff No. 4008.21.0000

JACK LEE, PRESIDENT
VERSATECH INDUSTRIES
210 Barton Road
Weston, Ont., CA M9M 2W6

Re: Modification of Headquarters Ruling Letter 087392 (8/6/92); Request for Internal Advice 15/90; Tariff Classification of Composite Cork/Rubber Gasket Material.

DEAR SIR:

On August 6, 1992, this office issued you Headquarters Ruling Letter (HRL) 087392 in which we classified finished automotive gaskets and gasket material made of a cork/rubber composite material in subheadings 8409.91.9190, Harmonized Tariff Schedule of the United States (HTSUS), and 4504.10.1000, HTSUS, respectively. Upon further consider-

ation, that ruling is deemed to be partially in error as regards the classification of the cork/rubber gasket material. Our analysis follows.

Facts:

The merchandise the subject of this modification consists of gasket material made of a cork and rubber composite in sheet or strip form. The relative weight of the components varies from 60 to 80 percent rubber and 20 to 40 percent cork. The cork and rubber are combined in Portugal and formed into blocks. The blocks are shipped to Canada where the importer slices the large pieces into sheets or elongated strips.

Issue:

What is the proper classification of the composite cork/rubber gasket material?

Law and Analysis:

Classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's, taken in order.

In HRL 087392, this office determined that the subject cork/rubber composite material was classifiable in heading 4504, HTSUS, which provides for "[A]gglomerated cork (with or without a binding substance) and articles of agglomerated cork," by application of GRI 1. In support of this classification, it was noted that the heading text described the subject material and the Explanatory Note to heading 4504, at page 717, described agglomerated cork with a binder of vulcanized rubber.

Upon further consideration of this matter, Customs has determined that the rubber component of the subject material is described by heading 4008, HTSUS, which provides for "[P]lates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber." As the subject material is described in equally specific terms by headings 4008 and 4504, HTSUS, classification is pursuant to a GRI 3(b) analysis.

GRI 3(b) provides:

> "(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

Explanatory Note (EN) VIII to GRI 3(b) states:

> "[T]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods."

In applying these criteria to the material at issue, it is noted that the rubber component is of greater weight and value than the cork component. Moreover, the rubber component contributes an important function to the material's end use as a gasket. A gasket is a seal or packing used to make a pipe or other joint air- or fluid-tight. As vulcanized rubber is compressible, it enhances a gasket's ability to maintain a seal when joints compress or expand. Vulcanized rubber is also impermeable to gas and liquid, thereby contributing to a gasket's ability to maintain a seal.

Based on the foregoing, Customs views the rubber component as imparting the essential character to the composite material. Accordingly, classification is proper in subheading 4008, HTSUS.

Holding:

HRL 087932 is hereby modified.

That portion of HRL 087392 which classified cork and rubber composite material is modified and the subject material is classifiable in subheading 4008.10.0000, HTSUS, which provides for "[P]lates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber: of noncellular rubber: plates, sheets and strip," dutiable at a rate of 0.7 percent *ad valorem*. There is no quota category applicable to the merchandise at this time.

The classification of the finished gaskets in HRL 087392 remains unchanged.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF TWO RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF MEN'S SLEEP BOTTOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of two tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of men's sleep bottoms. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before September 4, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W. Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Shirley Greitzer, Textile Classification Branch (202) 927–1695

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization Act) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of men's sleep bottoms. Comments are invited on the correctness of the proposed ruling.

In Headquarters Ruling Letters (HQ) 089358, dated August 12, 1991, and 089247 dated July 18, 1991, (modified by HQ 950966, dated January 27, 1992), men's sleep bottoms, were held to be classifiable under subheading 6207.91.3010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similiar articles: other: of cotton: other: sleepwear. HQ 089358 is set forth as "Attachment A", HQ 089247 is set forth as "Attachment B" to this document.

It is Customs view that the presence of side seam pockets and the lack of a fly on men's pants (or bottoms) are not indicative of a sleepwear bottom but a multi-purpose garment that may (and probably will) be worn for purposes other than sleeping. These bottoms can easily make

the transition from inside the home (a private setting) to outside the home (and a more social environment). The lack of a fly makes them suitable for modesty purposes and the presence of pockets makes them a comfortable and useful outerwear garment to carry keys, money, identification and similar small objects. As such, we find that these garments are properly classified in heading 6203, HTSUS.

Customs intends to revoke HQ 089247 and HQ 089358 to reflect the proper classification of these outerwear garments under this heading. Before taking this action, consideration will be given to any written comments timely received. Proposed HQ 960849 revoking HQ 089247 is set forth in "Attachment C" to this document, proposed HQ 960848 revoking HQ 089358 is set forth in "Attachment D" to this document.

Claims for detrimental reliance under section 177.9, Customs Regualtions (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 16, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, August 12, 1991.
CLA-2 CO:R:C:T 089358 CRS
Category: Classification
Tariff No. 6207.91.3010

DIANE L. WEINBERG, ESQ.
SANDLER, TRAVIS & ROSENBERG, P.A.
505 Park Avenue
New York, NY 10022-1106

Re: Men's sleep bottoms without matching tops not classifiable as pajamas; HRL 088635.

DEAR MS. WEINBERG:

This is in reply to your letter dated April 29, 1991, to our New York office, on behalf of PGA Apparel Industries, concerning the classification of sleep bottoms. Samples were provided.

Facts:

The merchandise at issue consists of two pair of men's woven sleep bottoms manufactured in and imported from the Dominican Republic. One is a pair of sleep shorts; the other a pair of sleep pants. The garments are made from 100 percent cotton flannel and have neither pockets nor fly.

Issue:

Whether the garments in question are classifiable as pajamas or as other sleepwear.

Law and Analysis:

Heading 6207, HTSUSA, provides for, inter alia, men's or boys' nightshirts, pajamas, bathrobes, dressing gowns and similar articles. Within this heading there is a subheading

provision for nightshirts and pajamas, and a residual provision for similar articles. Customs considers pajamas to be two piece garments. In Headquarters Ruling Letter (HRL) 088635 dated May 24, 1991, we stated in pertinent part:

> [W]e find no support for the proposition that the common meaning of [the] term [pajamas] encompasses one part of a pajama set. In fact, it is questionable whether there can be pajama "bottoms" in the absence of pajama "tops." In such an event, it appears that what actually exists are sleep bottoms rather than pajama bottoms. Accordingly, pajama bottoms imported without their matching tops are not classifiable as pajamas.

The instant garments are similar to the sleep bottoms of HRL 088635 and are therefore classifiable under the residual provision of heading 6207. See also, HRL 089357 dated July 11, 1991.

Holding:

The garments in question are classifiable in subheading 6207.91.3010, HTSUSA, under the provision for men's or boys' singlets * * * nightshirts, pajamas, bathrobes, dressing gowns and similar articles; other; of cotton; other; sleepwear. They are dutiable at the rate of 6.5 percent *ad valorem* and are subject to textile quota category 351.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, July 18, 1991.

CLA-2 CO:R:C:T 089247 JS
Category: Classification
Tariff No. 6207.91.3000

SYLVIA PEREZ
M.G. MAHER & COMPANY
442 Canal Street
New Orleans, LA 70130

Re: Men's woven sleepwear bottoms; pajama pants/shorts; classifiable heading 6207, HTSUSA.

DEAR MS. PEREZ:

This is in reference to your letter of March 12, 1991, on behalf of Roytex, Inc., requesting classification of men's sleepwear under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Two samples of men's sleep bottoms were provided for our inspection. Both garments are made of printed, 100 percent cotton woven fabric, and each features side slash pockets and a fully elasticized waist with drawstring. Style SO 1175 has long pants legs, and style SO 1174 is a pair of shorts. Neither style has a fly front opening.

Whether men's-cotton sleepwear bottoms are classifiable as pajamas or garments similar to pajamas under the HTSUSA.

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI), taken in order. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

Heading 6207 provides for men's woven pajamas. The Explanatory Notes, the official interpretation of the tariff at the international level, state that heading 6207 includes nightshirts, pyjamas, bathrobes (including beachrobes), dressing gowns and similar articles for men or boys (garments usually worn indoors).

Pajamas are defined as two-piece sets, consisting of an upper and lower garment, for sleeping, lounging, etc. *See* HQ 088635 issued May 24, 1991 (pajama bottoms imported without matching tops not classifiable as pajamas). Therefore, since the pants and shorts are recognizable as men's sleepwear, but do not accompany pajama tops, they are properly classified as "other" sleepwear.

Holding:

The merchandise at issue, both styles SO 1175 and SO 1174 are classified under subheading 6207.91.3000, HTSUSA, which provides for men's and boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles: other: of cotton, other, textile category 352, dutiable at the rate of 6.5 percent *ad valorem*.

Due to the changeable nature of the statistical annotation and the restraint (quota/visa) categories applicable to textile merchandise, your client should contact its local Customs office prior to importation of this merchandise to determine the current status of any import restraints or retirements.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service which is available for inspection at your local Customs office.

The samples will be returned to you under separate cover, as requested.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 960849 SG
Category: Classification
Tariff No 6203.42.4015 and 6203.42.4050

SYLVIA PEREZ
M.G. MAHER & COMPANY
442 Canal Street
New Orleans, LA 70130

Re: Classification of men's garments; sleepwear vs. loungewear.

DEAR MS. PEREZ:

We have reconsidered our ruling HQ 089247 dated July 18, 1991, issued in response to your March 12, 1991, letter on behalf of Roytex, Inc., requesting a classification ruling for men's sleepwear bottoms pursuant to the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The subject merchandise consisted of two pairs of men's sleep bottoms. One with long pant legs; the other, a pair of shorts. Both garments were constructed of a woven cotton fabric, featured a fully elasticized waistband with drawstring and side slash pockets. Neither garment had a fly.

HQ 089247 classified the garments under subheading 6207.91.3000, HTSUS, which provides for men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles: other: of cotton, other.

Issue:

Whether the subject merchandise is properly classifiable as sleepwear under Heading 6207, HTSUS, or as outerwear garments under Heading 6203, HTSUS?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6207, HTSUSA, provides for, *inter alia*, men's nightshirts, pajamas and similar articles. Customs has consistently ruled that pajamas are generally two-piece garments worn for sleeping. One-piece garments such as sleep shorts and sleep pants used for sleeping are not classifiable as pajamas, instead they fall into a residual provision within Heading 6207, HTSUS, for similar articles.

If it is determined that the subject bottoms are classifiable as outerwear or loungewear, the applicable heading is Heading 6203, HTSUSA, which provides for, *inter alia*, men's trousers.

In determining the classification of garments submitted to be sleepwear, Customs usually considers the factors discussed in three court cases that addressed sleepwear. In *Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 144 (CAFC, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Finally, in *Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F. Supp. 248 (1995), the court was faced with the issue of whether women's boxer-style shorts were classifiable as "outerwear" under Heading 6204, HTSUSA, or as "underwear" under Heading 6208, HTSUSA. The court stated the following, in pertinent part:

> [P]laintiff's preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition, plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be.

Furthermore, we bring your attention to *International Home Textile, Inc.*, Slip Op. 97-31, March 18, 1997, which classified similar garments without a fly as loungewear in heading 6103, HTSUS. The court therein stated:

> Based upon a careful examination of the loungewear as well as the testimony of the various witnesses, the court finds that the loungewear items at issue do not share that essential character of privateness or private activity. As the parties have already stipulated, the loungewear is used primarily for lounging and not for sleeping. The court finds no basis in the exhibits, the witness testimony, or the loungewear's construction and design to find that it is inappropriate, at a minimum, for the loungewear to be worn at informal social occasions in and around the home, and for other individual, non-private activities in and around the house—e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like * * *.

With respect to the bottoms which were the subject of HQ 089247, they feature no fly and side seam pockets. It is now the opinion of this office that bottoms with the combination of

those two features are not sleepwear bottoms but multi-purpose garments that may (and probably will) be worn for purposes other than sleeping. These bottoms can easily make the transition from inside the home (a private setting) to outside the home (and a more social environment). The lack of a fly makes them suitable for modesty purposes and the presence of pockets makes them a comfortable and useful outerwear garment to carry keys, money, identification and similar small objects. Additionally, even if the garments were to lack both the fly and the side seam pockets, the absence of the fly on the bottoms is indicative of a multi-purpose garment. See HQ 960432, dated August 22, 1997, in which we held that bottoms with a combination of no fly and side seam pockets, garments substantially identical to that at issue here, were not sleepwear bottoms but a multi-purpose garment classified in heading 6203, HTSUS.

Accordingly, we find that these garments are properly classified in heading 6203, HTSUS.

Holding:

The bottoms without a fly and without pockets are more properly classified as follows: the pants are classified in subheading 6203.42.4015, HTSUS, which provides for Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Trousers, bib and brace overalls, breeches and shorts (con.): Of cotton): Other: Other: Trousers and breeches: Men's: Other. The applicable rate of duty is 17.3 percent *ad valorem* and the quota category is 347; the shorts are classifiable in subheading 6203.42.4050, HTSUS, which provides for Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Trousers, bib and brace overalls, breeches and shorts: Of cotton: Other: Other: Shorts: Mens. The applicable rate of duty is 17.3 percent *ad valorem* and the quota category is 347.

HQ 089247 is hereby revoked.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 960848 SG
Category: Classification
Tariff No. 6203.42.4015 and 6203.42.4050

BETH RING, ESQ.
SANDLER, TRAVIS & ROSENBERG, P.A.
505 Park Avenue
New York, NY 10022

Re: Classification of men's garments; sleepwear vs. loungewear

DEAR MS. RING:

We have reconsidered our ruling HQ 089358 dated August 12, 1991, issued in response to your firm's April 29, 1991, letter on behalf of PGA Apparel Industries, requesting a classification ruling for men's sleepwear bottoms pursuant to the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The subject merchandise consisted of two pairs of men's sleep bottoms. One with long pant legs, the other a pair of shorts. Both garments were constructed of 100 percent flannel and had neither pockets nor fly.

HQ 089358 classified the garments under subheading 6207.91.3010, HTSUS, which provides for men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles: other: of cotton: other: sleepwear.

Issue:

Whether the subject merchandise is properly classifiable as sleepwear under Heading 6207, HTSUS, or as outerwear garments under Heading 6203, HTSUS?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6207, HTSUSA, provides for, *inter alia*, men's nightshirts, pajamas and similar articles. Customs has consistently ruled that pajamas are generally two-piece garments worn for sleeping. One-piece garments such as sleep shorts and sleep pants used for sleeping are not classifiable as pajamas, instead they fall into a residual provision within Heading 6207, HTSUSA, for similar articles.

If it is determined that the subject bottoms are classifiable as outerwear or loungewear, the applicable heading is Heading 6203, HTSUSA, which provides for, *inter alia*, men's trousers.

In determining the classification of garments submitted to be sleepwear, Customs usually considers the factors discussed in three court cases that addressed sleepwear. In *Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 144 (CAFC, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Finally, in *Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F. Supp. 248 (1995), the court was faced with the issue of whether women's boxer-style shorts were classifiable as "outerwear" under Heading 6204, HTSUSA, or as "underwear" under Heading 6208, HTSUSA. The court stated the following, in pertinent part:

> [P]laintiff's preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition,

plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be.

Furthermore, we bring your attention to *International Home Textile, Inc.*, Slip Op. 97–31, March 18, 1997, which classified similar garments without a fly as loungewear in heading 6103, HTSUS. The court therein stated:

> Based upon a careful examination of the loungewear as well as the testimony of the various witnesses, the court finds that the loungewear items at issue do not share that essential character of privateness or private activity. As the parties have already stipulated, the loungewear is used primarily for lounging and not for sleeping. The court finds no basis in the exhibits, the witness testimony, or the loungewear's construction and design to find that it is inappropriate, at a minimum, for the loungewear to be worn at informal social occasions in and around the home, and for other individual, non-private activities in and around the house—e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like. * * *

With respect to the bottoms which were the subject of HQ 089358, they feature no fly and no pockets. It is now Customs view that the lack of a fly on mens pants (or bottoms) makes them suitable for modesty purposes. It is not indicative of a sleepwear bottom but a multi-purpose garment that may (and probably will) be principally worn for the type of non-private activities named in *International Home Textiles, Inc.* Finally, although the garment may be worn to bed for sleeping, it is our opinion that their principal use is for "home comfort" and lounging. In addition, these bottoms can easily make the transition from inside the home (a private setting) to outside the home (and a more social environment). See for example HQ 960432 dated August 22, 1997, in which we held that the lack of a fly on similar bottoms was indicative of multi-purpose garments which will be worn for purposes other than sleeping. Therefore, following both HQ 960432 and the decision in *International Home Textiles, Inc.*, the bottoms at issue are properly classified in heading 6203, HTSUS.

Holding:

The bottoms without a fly and without pockets are more properly classified as follows: the pants are classified in subheading 6203.42.4015, HTSUS, which provides for Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Trousers, bib and brace overalls, breeches and shorts: Of cotton: Other: Other: Trousers and breeches: Men's: Other. The applicable rate of duty is 17.3 percent *ad valorem* and the quota category is 347; the shorts are classifiable in subheading 6203.42.4050, HTSUS, which provides for Men's or boys' suits, ensembles, suit-type jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear): Trousers, bib and brace overalls, breeches and shorts: Of cotton: Other: Other:Shorts: Mens. The applicable rate of duty is 17.3 percent *ad valorem* and the quota category is 347.

HQ 089358 is hereby revoked.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ARTIFICIAL GRAPHITE LUBRICANTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement (NAFTA) Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of certain artificial graphite lubricants under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed modification was published on June 17, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 24. No comments were received in response to this notice.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 5, 1998.

FOR FURTHER INFORMATION CONTACT: Paul G. Hegland, General Classification Branch, Office of Regulations and Rulings (202) 927–1172.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 17, 1998, Customs published in the CUSTOMS BULLETIN, Volume 32, Number 24, a notice of a proposal to modify New York Ruling Letter (NY) 818346 dated March 1, 1996, which held that certain artificial graphite lubricants were classifiable in subheading 3801.90.00, HTSUS, as other artificial graphite. Three lubricants were addressed: Type A—a mixture of synthetic graphite, starch, and polyvinylacetate; Type B—a mixture of synthetic graphite and polyvinylacetate; and Type C—a mixture of synthetic graphite, bentonite clay, and an ethylene oxide or propylene oxide copolymer. No comments were received in response to this notice.

The tariff classification in NY 818346 was based on the belief that each of the mixtures were dry, that in no case was the synthetic graphite suspended in a liquid medium. Customs has now learned that in one of the products, Type B, the synthetic graphite is suspended in water.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the NAFTA Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), this notice advises interested parties that Customs is modifying NY 818346 to reflect the proper classification of type B in subheading 3801.20.00, HTSUS, as colloidal or semi-colloidal graphite. The proper classification of types A and C, both dry mixtures of synthetic graphite and other materials, remains in subheading 3801.90.00,

HTSUS. Headquarters Ruling Letter (HQ) 959228 modifying NY 818346 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 20, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, July 20, 1998.
CLA–2 RR:CR:GC 959228 PH
Category: Classification
Tariff No. 3801.10.50,
3801.20.00 and 3801.90.00

MS. KATHLEEN CRAWFORD
MANAGER, CUSTOMS AFFAIRS
BDP INTERNATIONAL INC.
1017 4th Avenue
Lester, PA 19029–1813

Re: NY 818346 modified; artificial graphite lubricant; colloidal or semi-colloidal graphite.

DEAR MS. CRAWFORD:

On March 1, 1996, New York Ruling Letter (NY) 818346 was issued to you concerning "Product Type[s] A, B, [and] C (Artificial Graphite Lubricants)" from Switzerland. You were advised that each of the products was classifiable in subheading 3801.90.0000, Harmonized Tariff Schedule of the United States (HTSUS), as other preparations based on graphite or other carbon.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), notice of the proposed modification of NY 818346 was published on June 17, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 24. No comments were received in response to this notice.

Facts:

NY 818346 described product A as "a mixture of synthetic graphite, starch, and polyvinylacetate"; product B as "a mixture of synthetic graphite, polyvinylacetate"; and product C as "a mixture of synthetic graphite, bentonite clay, and an ethylene oxide or propylene oxide copolymer." In your letter of May 9, 1996, you describe the products as above, except that you state that product A is "a dry powder mixture"; product B is an "aqueous dispersion composed of synthetic graphite, polyvinylacetate, and water"; and product C is "a dry powder mixture composed of synthetic graphite, bentonite, and ethylene oxide/propylene oxide copolymer." You state that the foreign supplier advises that the additives to the synthetic graphite, in all cases, are stabilizing agents only which maintain the graphite particles in suspension and prevent sedimentation of the particles or fermentation of the dispersion.

The subheadings under consideration are as follows:

3801.10.50: Artificial graphite; colloidal or semi-colloidal graphite; preparations based on graphite or other carbon in the form of pastes, blocks, plates or other semimanufactures: Artificial graphite: * * * Other.

Goods classifiable under subheading 3801.10.50 receive duty-free treatment.

3801.20.00: Artificial graphite; colloidal or semi-colloidal graphite; preparations based on graphite or other carbon in the form of pastes, blocks, plates or other semimanufactures: * * * Colloidal or semi-colloidal graphite.

Goods classifiable under subheading 3801.20.00 receive duty-free treatment.

3801.90.00: Artificial graphite; colloidal or semi-colloidal graphite; preparations based on graphite or other carbon in the form of pastes, blocks, plates or other semimanufactures: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 4.9% *ad valorem*.

Issue:

Whether the merchandise is classifiable as other artificial graphite in subheading 3801.10.50, HTSUS, colloidal or semi-colloidal graphite in subheading 3801.20.00, HTSUS, or other preparations based on graphite or other carbon in subheading 3801.90.00, HTSUS.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that, for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(b) provides that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances, any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance, and the classification of goods consisting of more than one material or substance shall be according to the principles of GRI 3. Under GRI 3(b), in pertinent part, when, by application of GRI 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings and they cannot be classified by reference to GRI 3(a) (by reference to the heading which provides the most specific description), mixtures shall be classified as if they consisted of the material which gives them their essential character. GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

EN GRI Rule 2(b)(X) provides, in part, that:

> * * * Mixtures being preparations described as such in a Section or Chapter Note or in a heading text are to be classified under the provisions of Rule 1.

EN 38.01 provides, in part, that:

> (1) **Artificial graphite** (electro-graphite) is * * * a product * * * with an apparent specific gravity of about 1.5 to 1.6 and a homogeneous microcrystalline structure which X-ray examination shows to be that of graphite. Chemical analysis confirms that the substance is graphite (precipitation of graphitic acid).
>
> * * * * * * *
>
> Artificial graphite of this heading is usually in the form of powder, flakes, blocks, plates, bars, rods, etc. The blocks and plates are used, after cutting and high-finish machining (fine tolerances and appropriate surface finish), to make the brushes or other electrical carbon articles of heading 85.45 or parts of nuclear reactors.
>
> * * * * * * *
>
> (2) **Colloidal or semi-colloidal graphite**.
>
> (a) **Colloidal graphite** consists of finely divided natural or artificial graphite in colloidal suspension in water or in other media (e.g., alcohol, mineral oil), to which

may be added small quantities of other products such as tannin or ammonia for the purpose of stabilising the suspension. Colloidal graphite is usually semi-liquid, and is mainly used for the manufacture of lubricating preparations or for its high electrical conductivity.

(b) **Semi-colloidal graphite** (i.e., graphite in semi-colloidal suspension in water or in other media). Semi-colloidal graphite may be used for the preparation of graphited oils or for forming graphited surfaces.

This category covers only graphite in colloidal or semi-colloidal suspension in any media, the graphite being the basic constituent.

Thus, to be classified as colloidal or semi-colloidal graphite, the merchandise must consist of graphite in colloidal suspension in water or in other media, and graphite must be the basic constituent. "Colloid" is defined as "a homogeneous mixture of substances, at least one of which is very finely dispersed", The *Encyclopedia Americana*, International Ed. (1980), vol. 7, 260, *Colloid* (see also, *Hawley's Condensed Chemical Dictionary*, 12th Ed. (1993), *colloid chemistry*; *McGraw-Hill Encyclopedia of Science & Technology*, 6th Ed. (1987), vol. 4, *Colloid*; *Kirk-Othmer Encyclopedia of Chemical Technology*, 4th Ed. (1993), vol. 6, *Colloids*). "Suspension" is defined as "a liquid medium containing small solid particles that are at least 1 micron (0.00004 inch) in diameter and do not pass through filter paper[;] * * * [m]ixtures containing solid particles that are small enough to pass through filter paper and that do not settle out on standing are called colloidal suspensions or sols", The *Encyclopedia Americana*, International Ed. (1980), vol. 26, 77, *Suspension* (see also, *Hawley's Condensed Chemical Dictionary*, 12th Ed. (1993), *suspension* "[a] system in which very small particles (solid, semi-solid, or liquid) are more or less uniformly dispersed in a liquid or gaseous medium * * *").

Thus, under the above definitions, for graphite to be in colloidal or semi-colloidal suspension, the graphite, in very small particles, must be dispersed in a liquid or gaseous medium. This is consistent with the technical definition of colloidal and semi-colloidal graphite found in the *Kirk-Othmer Encyclopedia of Chemical Technology* (4th Ed. 1992). According to that text, under the heading **CARBON (NATURAL GRAPHITE), Colloidal Graphite** (vol. 4, at 1115):

> Colloidal graphite refers to a permanent suspension of fine, natural, or synthetic graphite in a liquid medium. The average particle size is about 1 μm and protective colloids ensure permanency of the suspension. * * * The name semicolloidal is applied to less stable dispersions, ie [*sic*], those that settle more readily because of large particle size, less effective processing, or both.

According to all of the available information, including review by the Customs Service's Office of Laboratories and Scientific Services, product B, consisting of an aqueous dispersion composed of synthetic graphite, polyvinylacetate, and water, meets the above definitions. Product B is classifiable as colloidal or semi-colloidal graphite in subheading 3801.20.00, HTSUS.

Products A and C, dry mixtures of, respectively, synthetic graphite, starch, and polyvinylacetate, and of synthetic graphite, bentonite clay, and an ethylene oxide/propylene oxide copolymer, do not meet the above definitions because the graphite is not suspended in a liquid medium. They may not be classified in subheading 3801.20.00, HTSUS.

Products A and C are each mixtures of artificial graphite with other materials or substances. However, under EN GRI Rule 2(b)(X), the products may not be classified as artificial graphite, in subheading 3801.10.50, HTSUS, by virtue of GRI 2(b) or 3(b). That is, heading 3801 provides for "*preparations* based on graphite or other carbon in the form of pastes, blocks, plates or other semimanufactures" (emphasis added). EN GRI Rule 2(b)(X) states that if a heading provides for a preparation, a mixture which is such a preparation is classifiable according to the terms of the heading (and any relevant section or chapter notes). Products A and C are such preparations (*i.e.*, they are semimanufactures (components for the production of aqueous graphite dispersions such as product B) based on graphite in the form of mixtures). They are classifiable in subheading 3801.90.00, HTSUS, as other preparations based on graphite or other carbon in the form of a semimanufacture. The classification of products A and C in NY 818346 is unchanged.

Holding:

Product B, an aqueous dispersion composed of synthetic graphite, polyvinylacetate, and water, is classifiable as colloidal or semi-colloidal graphite in subheading 3801.20.00, HTSUS; products A and C, dry mixtures of synthetic graphite and other materials, are clas-

sifiable as other preparations based on graphite or other carbon in subheading 3801.90.00, HTSUS.

Effect on Other Rulings:

NY 818346 dated March 1, 1996, is **MODIFIED** accordingly. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF CERTAIN MEAT OF SWINE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying three rulings pertaining to the tariff classification of certain meat of swine.

EFFECTIVE DATE: These decisions are effective for merchandise entered or withdrawn from warehouse, for consumption on or after October 5, 1998.

FOR FURTHER INFORMATION CONTACT: John G. Black, General Classification Branch, Commercial Rulings Division, (202) 927–1317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), on June 10, 1998, Customs published a notice in the CUSTOMS BULLETIN, Vol. 32, No. 22/23, proposing to modify New York Ruling Letters (NY) B82748, issued March 11, 1997, A80393, issued March 7, 1996, and 818468, issued January 30, 1996, all pertaining to the tariff classification of certain meat of swine and inviting comments on the correctness of the proposed modification. No comments were received in response to the notice.

Therefore, this notice advises interested parties that Customs is modifying these three rulings pertaining to the classification of certain

meat of swine, namely, back pork bacon, cured pork middles, and cured bacon.

In New York Ruling Letter (NY) B82748, issued on March 11, 1997, Customs ruled that certain forms of swine meat were classified under subheading 0210.12.0020, Harmonized Tariff Schedule of the United States (Annotated)(HTSUSA), a provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Bellies (streaky) and cuts thereof, Other" now dutiable at 1.7 cents per kilogram as products of Denmark. Headquarters Ruling Letter (HQ) 960584 modifying NY B82748 is set forth in "Attachment A" to this document.

In NY A80393, issued on March 7, 1996, Customs ruled that frozen, rindless, cured, smoked or unsmoked, back pork bacon slabs were classified under subheading 0210.12.0020, HTSUSA, a provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Bellies (streaky) and cuts thereof, Other" now dutiable at 1.7 cents per kilogram as a product of Denmark. HQ 960585 modifying NY A80393 is set forth in "Attachment B" to this document.

In NY 818468, issued on January 30, 1996, Customs ruled that frozen, rindless, smoked back pork bacon was classified under subheading 0210.12.0020, HTSUSA, a provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Bellies (streaky) and cuts thereof, Other" now dutiable at 1.7 cents per kilogram as a product of Denmark. HQ 960586 modifying NY 818468 is set forth in "Attachment C" to this document.

These modified rulings reflect the proper classification of all the identified products in subheading 0210.19.0090, HTSUSA, the provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Other, Other" now also dutiable at 1.7 cents per kilogram.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 20, 1998.

MARVIN AMERNICK,
(for John A. Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, July 20, 1998.

CLA-2 RR:CR:GC 960584 JGB
Category: Classification
Tariff No. 0210.19.0090

MR. GURMEJ SINGH
JB FOODS
159 Bayne Crescent
Cambridge, Ontario N1T 1K4
Canada

Re: Modification of NY B82748; tariff classification of bacon from Denmark.

DEAR MR. SINGH:

This is in reference to New York Ruling Letter (NY) B82748, issued to you on March 11, 1997, concerning the classification of bacon products from Denmark.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), on June 10, 1998, Customs published a notice in the CUSTOMS BULLETIN, Vol. 32, No. 22/23, proposing to modify New York Ruling Letter (NY) B82748, issued March 11, 1997, pertaining to the tariff classification of certain meat of swine and inviting comments on the correctness of the proposed modification. No comments were received in response to the notice.

Facts:

In New York Ruling Letter (NY) B82748, issued March 11, 1997, Customs ruled that (1) frozen, rindless, back pork bacon and (2) frozen, rindless, *smoked*, back pork bacon would be properly classified under subheading 0210.12.0020, Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA), a provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Bellies (streaky) and cuts thereof, Other" now dutiable at 1.7 cents per kilogram as products of Denmark.

Upon review of this ruling, Customs has discovered an error in the classification with respect to the two products enumerated above. Those products should have been classified in subheading 0210.19.0090, HTSUSA, the provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Other, Other", dutiable at 1.7 cents per kilogram.

Issue:

Whether the identified products are classified as "Bellies and cuts thereof" or as other than hams, shoulders, and bellies.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to the GRIs.

This matter is governed by GRI 6, in that the choice in classification is between two subheadings at the 6-digit level. In this case, the named provision, "bellies" does not describe the product in that only a small portion of belly strip is left attached to the back. Therefore, the products are "other" than bellies and are classified in subheading 0210.19.0090, HTSUSA.

Holding:

NY B82748, issued March 11, 1997, is modified to reclassify "1. Frozen, rindless, back pork bacon" and "2. Frozen, rindless, smoked, back pork bacon" in subheading 0210.19.0090, HTSUSA, the provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Other, Other", dutiable at 1.7 cents per kilogram.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10 (c)(1)).

MARVIN AMERNICK,
(for John A. Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, July 20, 1998.

CLA–2 RR:CR:GC 960585 JGB
Category: Classification
Tariff No. 0210.19.0090

MR. GURMEJ SINGH
JB FOODS
159 Bayne Crescent
Cambridge, Ontario N1T 1K4
Canada

Re: Modification of NY A80393; tariff classification of bacon from Denmark.

DEAR MR. SINGH:

This is in reference to New York Ruling Letter (NY) A80393, issued to you on March 7, 1996, concerning the classification of bacon products from Denmark.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), on June 10, 1998, Customs published a notice in the CUSTOMS BULLETIN, Vol. 32, No. 22/23, proposing to modify New York Ruling Letter (NY) A80393, issued March 7, 1996, pertaining to the tariff classification of certain meat of swine and inviting comments on the correctness of the proposed modification. No comments were received in response to the notice.

Facts:

In NY A80393, issued March 7, 1996, Customs ruled that frozen, rindless, cured, smoked or unsmoked back pork bacon slabs would be properly classified under subheading 0210.12.0020, Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA), a provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Bellies (streaky) and cuts thereof, Other" now dutiable at 1.7 cents per kilogram as products of Denmark.

Upon review of this ruling, Customs has discovered an error in the classification with respect to the product described above. The product should have been classified in subheading 0210.19.0090, HTSUSA, the provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Other, Other", dutiable at 1.7 cents per kilogram.

Issue:

Whether the identified product is classified as "Bellies and cuts thereof" or as other than hams, shoulders, and bellies.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to the GRIs.

This matter is governed by GRI 6, in that the choice in classification is between two subheadings at the 6-digit level. In this case, the named provision, "bellies" does not describe the product in that the product consists of back, not belly meat. Therefore, the products are "other" than bellies and are classified in subheading 0210.19.0090, HTSUSA.

Holding:

NY A80393, issued March 7, 1996, is modified to reclassify frozen, rindless, cured, smoked or unsmoked back pork bacon slabs in subheading 0210.19.0090, HTSUSA, the provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Other, Other", dutiable at 1.7 cents per kilogram.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10 (c)(1)).

MARVIN AMERNICK,
(for John A. Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, July 20, 1998.

CLA–2 RR:CR:GC 960586 JGB
Category: Classification
Tariff No. 0210.19.0090

MR. GURMEJ SINGH
JB FOODS
159 Bayne Crescent
Cambridge, Ontario N1T 1K4
Canada

Re: Modification of NY 818468; tariff classification of bacon from Denmark.

DEAR MR. SINGH:

This is in reference to New York Ruling Letter (NY) 818468, issued to you on January 30, 1996, concerning the classification of bacon products from Denmark.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), on June 10, 1998, Customs published a notice in the CUSTOMS BULLETIN, Vol. 32, No. 22/23, proposing to modify New York Ruling Letter (NY) 818468, issued January 30, 1996, pertaining to the tariff classification of certain meat of swine and inviting comments on the correctness of the proposed modification. No comments were received in response to the notice.

Facts:

In NY 818468, issued January 30, 1996, Customs ruled that rindless, smoked back pork bacon would be properly classified under subheading 0210.12.0020, Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA), a provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Bellies (streaky) and cuts thereof, Other" now dutiable at 1.7 cents per kilogram as products of Denmark.

Upon review of this ruling, Customs has discovered an error in the classification with respect to the product described above. The product should have been classified in subheading 0210.19.0090, HTSUSA, the provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Other, Other", dutiable at 1.7 cents per kilogram.

Issue:

Whether the identified product is classified as "Bellies and cuts thereof" or as other than hams, shoulders, and bellies.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to the GRIs.

This matter is governed by GRI 6, in that the choice in classification is between two subheadings at the 6-digit level. In this case, the named provision, "bellies" does not describe the product in that only a small portion of belly strip is left attached to the back. Therefore, the product is "other" than bellies and is classified in subheading 0210.19.0090, HTSUSA.

Holding:

NY 818468, issued January 30, 1996, is modified to reclassify rindless, smoked back pork bacon in subheading 0210.19.0090, HTSUSA, the provision for "Meat and edible offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Other, Other", dutiable at 1.7 cents per kilogram.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John A. Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF THE CHEMICAL COMPOUND "1-(3-DIMETHYLAMINOPROPYL) -3- ETHYLCARBODIIMIDE HYDROCHLORIDE"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two rulings pertaining to the tariff classification of the chemical compound 1-(3-dimethylaminopropyl) -3-ethylcarbodiimide hydrochloride (CAS # 25952–53–8) under the Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA). Notice of the proposed revocation was published on June 10, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 22/23. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 5, 1998.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, Office of Regulations and Rulings (202) 927–2346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 10, 1998, Customs published in the CUSTOMS BULLETIN, Volume 32, Number 22/23, a notice of a proposal to revoke New York Ruling Letter (NY) 889550, issued September 15, 1993, which held that 1-(3-dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride was classifiable in subheading 2925.19.5000, HTSUSA, and NY 807959, issued April 3, 1995, which held that 1-(3-dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride was classifiable in subheading 2925.19.9000, HTSUSA, the analogous provision in the 1995 tariff schedule. No comments were received in response to this notice.

1-(3-Dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride contains a carbon which is double bonded to two nitrogen atoms. This is characteristic of an imine. This compound does not include the—CO.NH.CO—functional group found in imides.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 889550 and NY 807959 to reflect the proper classification of 1-(3-dimethylaminopropyl) -3- ethylcarbodiim-

ide hydrochloride in subheading 2925.20.9000, HTSUSA, the provision for carboxyimide-function compounds (including saccharin and its salts) and imine function compounds: imines and their derivatives; salts thereof: other: other. HQ 958631, revoking NY 889550 and NY 807959, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 17, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, July 17, 1998.

CLA–2 RR:CR:GC 958631 MGM
Category: Classification
Tariff No. 2925.20.9000

MR. EDMUND J. CORBOY
AUSTIN CHEMICAL COMPANY, INC.
1565 Barclay Boulevard
Buffalo Grove, IL 60089–4537

Re: 1-(3-dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride (CAS # 25952–53–8); Revocation of NY 889550 and NY 807959.

DEAR MR. CORBOY:

This office has determined that New York Ruling Letter (NY) 889550, issued to you on September 15, 1993, and NY 807959, issued to you on April 3, 1995, concerning the tariff classification of 1-(3-dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride (CAS # 25952–53–8), are in error. Therefore, this ruling revokes NY 889550 and NY 807959.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation was published on June 10, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 22/23. No comments were received in response to this notice.

Facts:

In NY 889550, the Area Director, New York Seaport, ruled that 1-(3-dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride was classified in subheading 2925.19.5000, HTSUSA, the residual provision for nonaromatic imides and their derivatives. In NY 807959, Customs ruled that 1-(3-dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride was classified in subheading 2925.19.9000, HTSUSA, the analogous provision in the 1995 tariff schedule.

Upon review of this ruling, Customs has discovered an error in the classification of 1-(3-dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride. This product should have been classified in the residual provision for nonaromatic imines. This provision is found in subheading 2925.20.5000, HTSUSA, in the 1993 tariff schedule and 2925.20.9000, HTSU-

SA, in the 1995 tariff schedule. It continues to be subheading 2925.20.9000, HTSUSA, in the 1998 tariff schedule.

Issue:

Whether 1-(3-dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride is classified under the provision for imides and their derivatives, or the provision for imines and their their derivatives.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

This matter is governed by GRI 6, in that the choice in classification is between two subheadings at the 6-digit level. One provides for "imines and their derivatives; salts thereof," while the other provides for "imides and their derivatives; salts thereof." An imine is a compound "containing the group * * * =NH, in which the nitrogen atom is linked to a carbon atom by a double bond" while an imide is an organic compound "containing the group—CO.NH.CO.—." Daintith, *A Dictionary of Chemistry*, third ed., Oxford University Press. Inasmuch as 1-(3-Dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride contains carbon nitrogen double bonds characteristic of an imine but lacks the carbon oxygen double bond typical of an imide, it is properly classified in the subheading "imines and their derivatives; salts thereof."

Holding:

1-(3-Dimethylaminopropyl)-3-ethylcarbodiimide hydrochloride is classified in subheading 2925.20.5000, HTSUSA (1993) and subheading 2925.20.9000, HTSUSA (1995) with a general column one duty rate of 3.7% *ad valorem*. The proper classification under the current tariff is subheading 2925.20.9000, HTSUSA, with a 1998 general column one duty rate of 3.7% *ad valorem*.

NY 889550 and NY 807959 are revoked.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective for articles entered for consumption or withdrawn from warehouse for consumption 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

PUBLIC VERSION

(Slip Op. 98–80)

COALITION FOR THE PRESERVATION OF AMERICAN BRAKE DRUM AND ROTOR AFTERMARKET MANUFACTURERS, PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CHINA NATIONAL AUTOMOTIVE INDUS. IMPORT & EXPORT CO., QINGDAO METAL MINERALS & MACHINERY IMPORT & EXPORT CORP., YANTAI IMPORT & EXPORT CORP., LONGKOU BOHAI MACHINERY CO., BEIJING XINCHANGYUAN AUTOMOBILE FITTINGS CORP., CHINA NATIONAL MACHINERY IMPORT & EXPORT CORP., HEBEI METALS AND MACHINERY IMPORT & EXPORT CORP., SHANXI MACHINERY AND EQUIPMENT IMPORT & EXPORT CORP., CHINA NORTH INDUSTRIES CORP. (GUANGZHOU), CHINA NORTH INDUSTRIES CORP. (DALIAN), LONGJING WALKING TRACTOR WORKS FOREIGN TRADE IMPORT & EXPORT CORP., CHANGZHI AUTOMOTIVE PARTS FACTORY, AND SOUTHWEST TECHNICAL IMPORT & EXPORT CORP., DEFENDANT-INTERVENORS, AND CALIFORNIA BRAKE DRUM AND ROTOR, DEFENDANT-INTERVENOR

Court No. 97–05–00876

[Plaintiff's motion for judgment on the agency record is denied.]

(Decided July 13, 1998)

Porter, Wright, Morris & Arthur (Leslie Alan Glick) for Plaintiff.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Deputy General Counsel, Office of the General Counsel, U.S. International Trade Commission *(Marc A. Bernstein)* for Defendant.

White & Case (William J. Clinton and *Adams C. Lee)* for Defendant-Intervenors, China National Automotive Indus. Import & Export Co., *et al.*

Williams Mullen Christian & Dobbins (William E. Perry, Thomas B. McVey, and *W. David Snead)* for Defendant-Intervenor, California Brake Drum and Rotor.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* Plaintiff, the Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers (the "Co-

alition")[1], moves pursuant to Rule 56.2 of the Rules of this Court to challenge the final negative determination of the United States International Trade Commission ("ITC" or "Commission") that a domestic industry is not being materially injured or threatened with material injury by reason of imports of certain brake drums from China. The International Trade Administration of the Department of Commerce ("ITA" or "Commerce") found that they were being sold in the United States at less than fair value ("LTFV"). Jurisdiction is predicated upon 28 U.S.C. § 1581 (1994). For the reasons that follow, the Commission's final determination is sustained.

II

BACKGROUND

On March 7, 1996, the Coalition filed an antidumping duty petition with the ITA and ITC.[2] The petition alleged that certain brake drums and rotors from the People's Republic of China ("PRC" or "China") were being dumped in the United States at LTFV and were causing material injury and/or threat of material injury to a United States industry. The period of investigation ("POI") covers the years 1993 through 1996.

On February 28, 1997, Commerce announced its final antidumping duty determination. It found that certain brake drums and rotors were being sold in the United States at LTFV. *Notice of Final Determinations of Sales at LTFV: Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 9160 (Feb. 28, 1997). Commerce published its final amended affirmative determination on April 2, 1997. *Notice of Amended Final Determination of Sales at LTFV: Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 15,655 (April 2, 1997).

On April 16, 1997, the Commission issued its final determination. In a unanimous decision concerning the brake drums, the Commission found that a United States industry was not being materially injured nor threatened with material injury by reason of imports of certain brake drums from China.[3] In contrast, the Commission made an affirmative injury determination concerning certain brake rotors. *Certain Brake Drums and Rotors from China*, Inv. No. 731–TA–744 (Final), USITC Pub. 3035 ("Final Determination"); 62 Fed. Reg. 18,650 (ITC April 16, 1997). The determination concerning the brake rotors is not being challenged here.

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[1] The Coalition is composed of the following companies: Brake Parts, Inc., McHenry IL; Kinetic Parts Manufacturing, Inc., Harbor City, CA; Iroquois Tool Systems, Inc., Northeast PA; and Wagner Brake Corp., St. Louis, MO.

[2] Plaintiff brings this action pursuant to section 773 of the Tariff Act of 1930 ("Tariff Act") as amended by the Uruguay Round Agreement Act ("URAA"), Pub.L.No. 103–465 (1994) as the investigation was initiated after the effective date, January 1, 1995.

[3] Chairman Miller and Vice Chairman Bragg joined in the analysis of the Final Determination. Commissioner Crawford joined in only the factual "Views of the Commission" as to volume of imports of brake drums. Although she concurred in her colleagues' conclusion regarding significance of imports, price effects and impact, she provided her own individual analysis. *See Final Determination* at nn. 117, 124, 125.

Commissioner Newquist did not join in section V's discussion of material injury of the Final Determination. He determined that the domestic drum industry is not experiencing material injury, and thus did not need to reach the issue of causation. *Final Determination* at n.141.

III

STANDARD OF REVIEW

In reviewing the Commission's determination, this Court must sustain a final negative injury determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(1994). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550 (1988) (citation omitted). Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elect. Indus. Co. Ltd. v. United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (Fed. Cir. 1984) (citation omitted).

The reviewing court may not, "even as to matters not requiring expertise * * * displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In this regard "the court may not reweigh the evidence or substitute its judgment for that of the ITC." *Dastech Int'l., Inc. v. USITC*, 963 F. Supp. 1220, 1222 (CIT 1997); *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 8 Fed. Cir. (T) 36, 894 F.2d 385 (1990).

IV

DISCUSSION

In order to make a final affirmative determination in its injury investigation, the ITC must find that:

> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise * * *.

19 U.S.C. § 1671b(a)(1)(1994). With respect to LTFV imports, "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A)(1994).

A

THE ITC'S DETERMINATION THAT THE DOMESTIC BRAKE DRUM INDUSTRY WAS NOT BEING MATERIALLY INJURED BY REASON OF LTFV IMPORTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Plaintiff argues that the ITC determination is unsupported by substantial evidence in the record and contrary to law with regard to its finding of no material injury. Plaintiff contends that the ITC failed to consider evidence in the record on the volume of imports and their consequential and harmful impact on the U.S. industry. Accordingly, Plaintiff requests a reversal of the ITC's Final Determination or in the alternative, a remand to the ITC for further proceedings.

Defendant, United States, and Defendant-Intervenors, China National Automotive Indus., *et al.* ("China National"), and California Brake Drum and Rotor respond that the Commission's conclusions have the requisite evidentiary support, that no factual issues are in dispute and that the Coalition is, in reality, asking the Court to impermissibly reweigh the evidence.

The guidelines established by Congress for analyzing the issue of material injury mandate consideration of the following factors: (1) the volume of imports, (2) the effect of imports of that merchandise on prices in the United States for like products, and (3) the impact of such merchandise on domestic producers of like products. 19 U.S.C. § 1677(7)(B)(i)(1994); *Angus Chemical Co. v. United States*, 140 F.3d 1478, 1484 (Fed. Cir. 1998) (three mandatory factors). Pursuant to 19 U.S.C. § 1677(7)(B)(ii), the Commission may also "consider such other economic factors as are relevant to the determination." No single factor, however, is determinative and the Commission evaluates all relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii)(1994); *Companhia Paulista de Ferra-Ligas v. United States*, Slip Op. 96–63, 18 ITRD1542, –, 1996 WL 189515, *3 (CIT 1996).

In evaluating the evidence it collects during the investigation, the "commissioners are free to attach different weight to the various statutory tests which they are required to employ when evaluating the presence or threat of injury." *U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

A finding of an affirmative injury determination requires both "(1) present material injury and (2) a finding that the material injury is 'by reason of' the subject imports." *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997). "Evidence of de minimis (e.g., minimal or tangential) causation of injury does not reach the causation level required under the statute." *Id.* at 722.

1

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT THE VOLUME OF IMPORTS LACKED SIGNIFICANCE

19 U.S.C. § 1677(7)(C)(i) directs the Commission, in evaluating the volume of imports, to "consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."

In the *Final Determination*, the ITC found that the quantity of LTFV brake drum imports rose from zero in 1993 to 333,000 units ($3.4 million) in 1994, then rose to 494,000 units ($4.8 million) in 1995. *Final Determination* at 20. For interim 1996,[4] the ITC found the quantity of subject drum imports fell to 339,000 units ($2.9 million) which

[4] The interim period covers January through September.

amounted to fewer than the 456,000 units ($4.4 million) imported in interim 1995.[5] *Id.* The ITC also found the subject drum market penetration grew from 0 in 1993 to 7.6% in 1994 and then to 9.2% in 1995. In interim 1996, a market penetration of 7.5% amounted to less than a market penetration of 10.9% calculated for interim 1995. *Id.* at 21. The Commission additionally found that the domestic market share, on the other hand, "varied little throughout most of the period of investigation." *Id.* at 14.[6]

Plaintiff makes two arguments for its contention that the ITC erred in its analysis of subject import volume. First, it argues that the ITC erroneously concluded that the import volume of LTFV brake drums was not "significant." Plaintiff's Brief at 8. Second, Plaintiff maintains that the ITC failed to analyze the relationship between the import volume and conditions and trends in the marketplace. *Id.* at 10.

To support its claim that the ITC erroneously concluded the subject import volume was not significant, Plaintiff cites to other cases and Commission determinations where the ITC found a market penetration of less than 7.5% and made a material injury finding. Plaintiff asserts that "[c]learly market penetration levels of 7.4% to 9.2% are not insignificant as a matter of law." *Id.* To the extent that Plaintiff's argument rests on the theory that the level of market penetration in this case amounts to a *per se* finding of significance, its argument is flawed.

Reviewing the record as a whole as is required, "[f]or one industry, an apparently small volume of imports may have a significant impact on the market; for another the same volume might not be significant." S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474. Accordingly, "it is the significance of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7)." *USX v. United States*, 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987).[7] Therefore, a market penetration level of 7.5% does not mandate a conclusion that volume levels are significant.

Plaintiff also argues that this case presents the same issue addressed in the *USX Corp. v. United States* line of cases[8] where the Court ordered a remand to the ITC because the determinations were found to be insufficient and lacking in explanation. In this regard, Plaintiff claims that

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[5] Plaintiff refers to this finding as the "domestic aftermarket drum industry's *alleged* substantial increase in capacity," capacity utilization and increase in demand, Plaintiff's Rule 56.2 Motion For Judgement Upon the Agency Record at 10 ("Plaintiff's Brief") (emphasis added), yet, does not raise a dispute over the factual accuracy of the ITC's finding.

[6] Domestic market share ranged from 53.1% in 1993 to 50.3% in 1995. Interim 1996 market share of 43.7% was less than an interim 1995 share of 49.4%.

[7] Although not essential to its argument given the prevailing case law, the government, in contrast to plaintiff's assertions, points to cases and ITC determinations where a market penetration of more than 7.5% was found and the ITC still concluded that the volume of imports was not significant. *See e.g., Floral Trade Council v. United States*, Slip Op. 96–78 at 4–6, 1996 WL 276957 (CIT 1996) (market share increased from 46.1 to 56%); *Manganese Sulfate from the People's Republic of China*, Inv. No. 731–TA–725 (Final), USITC Pub. 2932 at 11–12 (Nov. 1995) (market penetration of 20.3% and no material injury).

[8] *See USX Corp. v. United States*, 11 CIT 82, 655 F. Supp. 487 (1987) (remanding case to ITC because analysis contained only conclusory statement that market penetration levels remained low and unstable); *USX Corp. v. United States*, 12 CIT 205, 682 F. Supp. 60 (1988) (second determination found insufficient because conclusory statement regarding market penetration did not address "how volume of imports relates to injury); *USX Corp. v. United States*, 12 CIT 844, 847, 698 F. Supp. 234, 238 (upholding determination since ITC analyzed the relationship of import volume to conditions and trends in the marketplace).

the ITC "relied heavily upon the volume of the subject imports, which increase in 1994 and 1995", only discussing "briefly" the increase in the domestic industry's productivity factors and taking a "cursory" look at the domestic industry's market share. Plaintiff's Brief at 10.

Here, the Commission, however, completed a thorough analysis, and on that basis, could not conclude that the subject import volume was "significant". *Final Determination* at 21. The ITC found that despite the increase in volume and market penetration of LTFV imports from 1993 to 1995, the U.S. domestic industry simultaneously increased its production, shipments, capacity and capacity utilization while the domestic industry's market share remained relatively stable.[9] Therefore, the ITC reasoned that the "U.S. producers maintained their predominant market presence" during the period 1993 to 1995. *Final Determination* at 21. Similarly, for interim 1996, the Commission concluded that the decrease in production, shipments, capacity utilization, and market share of the U.S. industry did not correlate with subject import volumes since such imports actually decreased in volume and market share during the same time. *Id.*

Moreover, "[b]ecause the increase in shipments was nearly as great as the increase in domestic consumption, U.S. producers' market share varied little throughout most of the period of investigation." *Final Determination* at 14. Reflecting the increase in shipments, sales revenues also rose for the domestic industry from "$43.7 million in 1993 to $49.5 million in 1994 and $52.1 million in 1995, an increase of 19.2 percent from 1993 to 1995." *Id.*

This case is plainly distinguishable from the holding in the *USX* cases where the ITC determinations were unsubstantiated. Substantial evidence supports the Commissioners' findings that the subject import volume was insignificant. More importantly, based on the facts in the record, the Commission quite reasonably concluded that the volume of subject imports lacked significance since they did not prevent the domestic industry from maintaining its predominant market presence.

2

THE COMMISSION REASONABLY CONCLUDED THAT THE LTFV IMPORTS DID NOT AFFECT DOMESTIC PRICES

The Commission must consider whether imports effect prices. It examines if:

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

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[9] Production rose from 2 million in 1993 to 2.9 million units in 1995 (an increase of 44.1%) although interim 1996 production of 2 million units amounted to slightly less than interim 1995 production of 2.1 million (a decrease of 5.1%). Shipments grew from $35.1 million in 1993 to $47.4 million in 1995 (35.2% increase). Interim 1996 shipments of $35.7 million were also slightly less than the $36.3 million shipped in interim 1995. Capacity also rose from 2,968 in 1993 to 3,168 in 1994 then to 3,418 in 1995 (1,000 units). Similarly, capacity utilization rose from 67.6% in 1993 to 79.8% in 1994 then to 84.6% in 1995. *Final Determination* at 14.

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii)(1994).

In its analysis of price effects, the Commission acknowledged that "[p]roducers' prices for domestically-produced aftermarket drums generally declined during the period of investigation" and that "the subject imports undersold the domestic like product in every producer price comparison." *Final Determination* at 21. Nevertheless, the Commission decided to give this evidence limited weight since it could not find the requisite nexus between the pricing of the subject imports and the domestic industry's operating performance. *Final Determination* at 22–23.[10]

Plaintiff challenges this analysis arguing that the "*consistent pattern of underselling * * * should be the single most significant factor in an injury determination antidumping cases.*" Plaintiff's Brief at 12 (emphasis in original). Plaintiff argues the ITC disregarded the consistent pattern of underselling and that therefore its determination is not in accordance with law. *Id.*[11]

To the extent plaintiff argues that evidence of underselling is a *per se* indication of injury, its argument fails. "Evidence of underselling alone is legally insufficient to support an affirmative injury determination." *BIC Corp. v. United States*, 964 F. Supp. 391, 401 (CIT 1997), *aff'd* App. No. 97–1443 (Fed. Cir. March 11, 1998). "Rather, the Commission has a statutory mandate to consider not only whether the subject imports have significantly undersold the domestic like product, but also how the subject imports effect the prices of the domestic like product." *Id.*; *see also Trent Tube Div. v. United States*, 14 CIT 386, 402, 741 F. Supp. 921, 935 (1990) (according less weight to underselling).

As noted earlier, the ITC has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis. *See Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). "The significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the absence of any factor listed in the bill can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide." S.Rep. No. 249, at 88 (1979) *reprinted in* 1979 U.S.C.C.A.N. 381, 474. Accordingly, plaintiff's assertion that the consistent pattern of underselling "should be

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[10] Other factors found in the record and unrelated to subject imports indicated alternative reasons for decreases in U.S. price. For example, as Defendant-Intervenors, China National note, the recent growth of programmed distribution groups ("PDGs"), associations of warehouse distributors banded together to combine purchasing power, enable a warehouse distributor "to obtain better prices than it could by acting alone." Defendant-Intervenors' Opposition to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record at 10–11 (quoting *Final Determination* at I–8, I–9).

[11] For support, plaintiff cites to cases and determinations where injury was found based on consistent, mixed and sporadic underselling. These cases only embody the legislative intent that the significance of various factors affecting an industry necessarily depend upon the facts of each case, *see Copperweld Corp. v. United States*, 12 CIT 148, 161, 682 F. Supp. 552, 565 (1988), and do not lend credence to Plaintiff's claim that evidence of underselling is a *per se* indicator of material injury.

the single most significant factor" is erroneous. The Court finds reasonable the ITC's analysis and weight attributed to the factors and evidence presented in the record.

Here, the ITC did not neglect the underselling evidence,[12] but determined that "any price pressure that the subject imports may have placed on the domestic aftermarket drum industry was insufficient to seriously erode the domestic industry's operation margins or to preclude it from earning larger profits during the latter portions of the period of investigation than at its inception." *Final Determination* at 22–23. This conclusion was specifically buttressed by the evidence in the record which revealed a substantial increase in operating income during the latter half of the investigation despite simultaneous increases in subject import volume and market penetration.[13] Although operating income declined from 1993 to 1994, when the subject imports were first introduced, the ITC determined that "any negative effects on the domestic aftermarket drum industry from the initial increase in subject imports were not evident by the conclusion of the [POI]." *Id.* at 23. Therefore, the Court finds that the Commission's determination that there was no nexus between pricing of the LTFV imports and the domestic industry's operating performance was supported by substantial evidence.

Plaintiff also asserts that the ITC did not consider the relationship between the "issues of substitutability and underselling." Plaintiff's Brief at 15. Although Plaintiff correctly argues that generally the greater the substitutability between imports and the domestic like products, the greater the volume effects and price effects, *see R-M Industries, Inc. v. United States*, 18 CIT 219, 226–27, 848 F. Supp. 204, 210 (1994), this Court has held that underselling combined with increasing import volumes does not "necessarily indicate[ ] injury due to pricing in cases involving fungible products * * *." *USX Corp.*, 12 CIT at 849, 698 F. Supp. at 239. In a material injury analysis, substitutability is but one factor in the evaluation of volume and price. *R-M Industries, Inc.*, 18 CIT at 226, 848 F. Supp. at 210.

Moreover, the Commission did not ignore the relationship between substitutability and underselling as claimed by Plaintiff. In her concurrence, Commissioner Crawford specifically analyzed the substitutability between the domestic like product, subject imports and non-subject imports.[14] Commissioner Crawford determined that even if the LTFV imports had been priced fairly, the domestic prices would not have increased because the more cheaply priced non-subject imports would

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[12] Commissioner Crawford states that she "rarely gives much weight to evidence of underselling since it usually reflects some combination of differences in quality, other nonprice factors, or fluctuations in the market during the period in which price comparisons were sought." *Final Determination* at 21, n. 122.

[13] Operating income increased from $6.6 million (13.4% margin: ratio to net sales value) in 1994 to $7.8 million (15%). Operating income for interim 1996 amounted to $7.2 million (18.7%) which increased from $5.6 million (11.4%) in interim 1995. *Final Determination* at 15.

[14] Commissioner Crawford found that "subject imports of brake drums, the domestic like product, and nonsubject imports of aftermarket brake drums are good substitutes for each other." *Final Determination* at 22, n. 124.

have captured the demand from the subject imports.[15] *Final Determination* at 22, n. 124. Thus, despite her construal of imported and domestic brake drums as good substitutes, the Commissioner found that the subject imports were not having significant effects on the domestic price of brake drums.

3

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT LTFV IMPORTS HAD NO ADVERSE IMPACT ON DOMESTIC PRODUCTS

Concerning the impact of LTFV imports on the state of the domestic industry, Congress requires that

> the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.[16]

19 U.S.C. § 1677(7)(C)(iii).

Here, Plaintiff contends that, contrary to the ITC determination, the subject imports adversely impacted the domestic industry. Plaintiff pinpoints several economic factors as the underlying thrust to its claim: an increase in inventories and a decrease in demand for U.S. products in conjunction with the economic factors discussed earlier with regard to price effects.[17] Plaintiff's Brief at 17–19. Additionally, Plaintiff disputes the ITC's conclusion that the initial decline in operating income (1993–1994) and any other negative effects on the domestic industry were outweighed at the conclusion of the POI by the positive rebound in

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[15] In its Reply, Plaintiff claims that "imports of LTFV drums from China increased while imports of non-LTFV [drums] decreased. Thus, LTFV imports have greater penetration force than non-LTFV imports." Plaintiff's Reply at 5. While it is true that non-LTFV imports from China declined from 1993–1994, imports of non-LTFV drums rose from 339 to 374 units from 1994–1995 and substantially increased by 77% (from 286 to 507 units) from interim 1995 to interim 1996 (thousands of units). *Final Determination* at IV–8.

[16] Section 222(b)(1)(B) of the URAA amended section 771(7)(C)(iii) of the Tariff Act to add "the magnitude of the margin of dumping" to the list of factors the ITC is required to consider. "This amendment does not alter the requirement in the current law that none of the factors which the Commission considers is necessarily dispositive in the Commission's material injury analysis." Statement of Administrative Action accompanying the URAA at 180, H.R. Doc. No. 103–316, Vol. 1, 103d Cong., 2d Sess. (1994) *reprinted in* Uruguay Round Agreements Act, Legislative History, Vol. VI, at 850 ("SAA").

Plaintiff does not challenge and the ITC considered the magnitude of the dumping margin. *See Final Determination* at 23, n. 128.

[17] Plaintiff also argues that the decrease in domestic price, market share and operating income from 1993–1994 lend support to its claim that subject imports adversely affected the domestic industry. These economic factors were addressed earlier in regard to price effects.

the domestic industry in 1996. Instead of signifying the domestic industry's ability to recuperate in the face of Chinese competition, Plaintiff contends the 1996 resurgence resulted from an increase in auto sales and the favorable performance of the U.S. economy in 1996 and therefore serve as an inappropriate basis for denying relief.

Similarly, Plaintiff argues that the ITC's conclusion that "the aftermarket drum industry showed strong financial performance" fails the "[c]ourt's * * * healthy industry test." *Id.* at 21. Plaintiff argues that even if the domestic industry were healthy, the domestic industry "would be in a much better situation had Chinese imports not been dumped in the U.S. market." *Id.* at 20–21.

Finally, Plaintiff claims that the ITC failed to fully consider the price depressing effects of the subject drum imports in comparison with the 33 domestic drum models upon which Plaintiff submitted relevant evidence. Hence, Plaintiff asserts that the ITC's finding of no adverse impact on the domestic industry is contrary to the facts in the record and thus unsupported by substantial evidence. The Court will address each of these arguments *seriatim*.

A

THE COMMISSION REASONABLY LIMITED THE PROBATIVE VALUE OF INCREASING INVENTORY LEVELS

The ITC acknowledged that domestic industry inventory levels, with some fluctuation, generally increased during the investigation period.[18] However, "[a]n increase in inventories does not compel an affirmative determination." *Torrington Co. v. United States*, 16 CIT 220, 225, 790 F. Supp. 1161, 1169 (1992) *aff'd*, 991 F.2d 809 (Fed Cir. 1993); *see Jeanette Sheet Glass Corp. v. United States*, 11 CIT 10, 16, 654 F. Supp. 179, 183 (1987) (affirming preliminary negative injury determination in the face of increasing inventories throughout period of investigation). Plaintiff's argument, in essence, concerns the weight the Commission assigned to the increase in inventories, which is within its discretion. The Court's duty is not to reweigh the evidence. In light of the ITC's findings concerning increases in the domestic industries capacity, capacity utilization, production and operating income, it was reasonable for the Commission to reach a negative determination despite the increase in the domestic industry's inventories.

Moreover, despite the increase in absolute inventory levels, the ITC found that "[t]he ratio of inventories to U.S. shipments declined from 25.4 percent in 1993 to 20.6 percent in 1994, and then rose to 22.3 percent in 1995; this ratio was 21.5 percent in interim 1996, as compared to 21.9 percent in interim 1995." *Final Determination* at 14. The decline in the ratio of inventories to U.S. shipments indicates a lack of inventory buildup adverse to the industry. *See Calabrian Corp. v. United State Int'l Trade Comm.*, 16 CIT 342, 349, 794 F. Supp. 377, 384–385 (1992) (af-

[18] Inventory levels decreased from 467,000 units in 1993 to 465,000 units in 1994. Inventory levels than jumped to 603,000 units in 1995. Interim 1996 levels of 563,000 units decreased from interim 1995 levels of 600,000 units. *Final Determination* at 14.

firming negative preliminary injury determination based on, *inter alia*, shipment to inventory ratio); *see also Nat'l Assoc. of Mirror Manufacturers v. United States*, 12 CIT 771, 776, 696 F. Supp. 642, 646 (1988) (declining ratio of inventories to total shipments).

B

THE COURT DECLINES TO TAKE JUDICIAL NOTICE OF NEWSPAPER REPORTS OF THE FAVORABLE PERFORMANCE OF THE U.S. INDUSTRY

Plaintiff contends that the 1996 resurgence in the domestic industry resulted from an increase in auto sales and the favorable performance of the U.S. economy in 1996 and therefore serve as an inappropriate basis for denying relief. Plaintiff failed to raise this issue at the administrative proceeding below, yet requests the Court to take judicial notice of these "facts" as presented in the Wall Street Journal and The Chicago Tribune.[19]

This Court's review of a final determination in an administrative review is restricted to a review of the administrative record. *See* 19 U.S.C. § 1516a(b)(2)(A)(1994). The administrative record "is limited to the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which section 1516 authorizes judicial review." *Koyo Seiko Co., Ltd. v. United States*, 955 F. Supp. 1532, 1544, n.9 (1997) (quoting *Neuweg Fertigung v. United States*, 16 CIT 724, 726, 797 F. Supp. 1020, 1022 (1992)). "Where the issue has not been raised at the administrative level, * * * a litigant must not be allowed to circumvent the requirement of exhausting its administrative remedies by raising the issue in its civil action." *Calabrian Corp.*, 16 CIT at 347, 794 F. Supp at 383 (quoting *Empire Plow Co., Inc. v. United States*, 11 CIT 847, 854, 675 F. Supp. 1348, 1354 (1987)). However, Fed. R. Evid. 201 provides that "[w]hether the action is before the court for decision on a record made before the agency or on the record made at a trial *de novo*, indisputable facts * * * may be judicially noticed by the court when such notice is requested by a party and is otherwise appropriate." *Win-Tex Products, Inc. v. United States*, 17 CIT 786, 789, 829 F. Supp. 1349, 1352 (1993); *see Borlem S.A.-Empreedimentos Industriais v. United States*, 8 Fed. Cir. (T) 164, 913 F.2d 933 (1990) (rejecting concept that review on the administrative record precludes any role for judicial notice).

The Court finds that the two newspaper articles are insufficient to satisfy the requirements of Rule 201 which require that judicially noticed facts are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201; *see e.g.*, *British Steel, plc v. United States*, 879 F. Supp.

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[19] *Economists are Predicting Slower '97 Growth*, Wall Street Journal, A2, Jan. 2, 1997; *Walkout in Canada Muddies UAW Talks*, Chicago Tribune, Bus. 1, Oct. 4, 1996.

1254, 1318 (1995) (rejecting request for judicial notice of facts neither generally known or readily verifiable).[20]

While it is true that a court may, in certain limited circumstances, take judicial notice of facts reported in newspaper articles, *see Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458–59 (9th Cir. 1995); *see also Associated General Contractors of America v. City of Columbus*, 936 F. Supp. 1363, 1425 (S.D.Ohio 1996), judicial notice of newspaper articles is not appropriate when the reported facts are not capable of easy verification. *See Cofield v. Alabama Public Service Comm'n*, 936 F.2d 512, 517 (11th Cir. 1991). Here, Plaintiff is not asking the Court to take judicial notice that two newspapers *reported* that the 1996 U.S. economy grew and light auto sales increased, but of the fact that the 1996 economy grew and light auto sales increased. Newspaper stories simply are not, by and large, admissible proof of facts. Plaintiff's assertions require the development of a factual record and the Court declines to take judicial notice of Plaintiff's proffered evidence. *Cf. Ohio Bell Telephone Co. v. Public Utility Comm'n*, 301 U.S. 292, 301 (1937)("[h]ow great the decline has been for this industry or that, for one material or another, in this year or in the next, can only be known to the experts, who may even differ among themselves.").

Moreover, even if the Court took judicial notice of the fitness of the U.S. economy in 1996, Plaintiff's rationale provides absolutely no basis for rejecting the Commission's well-reasoned determination.[21]

C

THE COMMISSION CONSIDERED WHETHER THE DOMESTIC INDUSTRY WOULD HAVE BEEN BETTER OFF HAD LTFV IMPORTS NOT BEEN DUMPED.

Plaintiff argues that the ITC's reliance on the health or robustness of the domestic industry cannot form the basis for an absence of material injury finding. Plaintiff maintains that even assuming the domestic industry was healthy, it "would be in a much better situation had Chinese imports not been dumped in the U.S. market." Plaintiff's Brief at 20–21. Plaintiff cites to *Republic Steel Corp. v. United States*, 8 CIT 29, 591 F. Supp. 640 (1984) and *Ball Bearings, Mounted or Unmounted, and Parts Thereof, from Argentina, et al.*, USITC Pub. 2374, Inv. Nos. 701–TA–307 and 731–TA–498–511 (April 1991) where Commissioner Brunsdale states in her dissent,

> [a]n industry can be profitable or "healthy" and still be materially injured by dumped imports. For example, an industry's sales have increased, but they would have increased much more * * * had imports not been dumped in the U.S. * * *

Id. at 60.

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[20] At oral argument Plaintiff conceded that it could not offer any additional supporting authority other than *Central Soya Co., Inc. v. United States*, 15 CIT 35 (1991) which concerns judicial notice of legislative facts.

[21] Defendant-Intervenor California Brake Drum points out that if "the brake drum industry was doing well because of the U.S. economy, why was its companion industry [brake rotors] doing so poorly." California Brake Drum and Rotor's Response to Plaintiff's Motion at 16.

At oral argument, Plaintiff withdrew its argument in light of contrary authority cited by the Government.[22]

D

THE ITC CONSIDERED AND REASONABLY DISCOUNTED PLAINTIFF'S PROFFERED EVIDENCE OF 33 DOMESTIC DRUM MODELS

Plaintiff also claims that the ITC failed to consider the price depressing effects of the drum imports from China in comparison to the 33 domestic drums models which compete directly with the Chinese drums. Plaintiff's Brief at 21. Plaintiff contends that data it submitted indicated that two of Plaintiff's companies demonstrated "weaker financial performance on the 33 drum models. * * *" *Id.* Plaintiff's argument is unpersuasive.

Despite Plaintiff's allegation, the ITC expressly considered and subsequently determined that the material submitted by Plaintiff was of limited probative value. *See Final Determination* at 23, n. 127. The ITC properly found it limited because "petitioner ha[d] not provided information from all domestic drum producers, and provide[d] only interim 1996 data for one producer." *Id.* Indeed, the statutory language "makes manifestly clear that Congress intended the ITC [to] determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports." *Copperweld*, 12 CIT at 165–66, 682 F. Supp. at 569 (rejecting a disaggregated analysis); *see Torrington Co. v. United States*, 16 CIT 220, 223, 790 F. Supp. 1161, 1167 (1992) (Commissioner did not abuse discretion by relying on questionnaire data and rejecting census data which was not available for entire period).[23] Thus, "[i]n requesting the Court to substitute the data contained in its petition for the questionnaire data, plaintiff requests the Court to [impermissibly] substitute its judgment for that of the Commission." *Id.*

The ITC considered all the factors that Plaintiff asserted as indicators of material injury such as price underselling, the decline in domestic market share, the decline in profitability when the subject imports were first introduced and the increase in inventories. Nonetheless, the Commission in the discretion assigned to it by Congress, gave more weight to economic factors it felt more relevant and more probative to the investigation. As the Commission determined, other indicators such as capac-

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[22] Arguing that the Coalition's brief mischaracterized the pertinent law, the government cited to *American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986) (overruling *Republic Steel*) and *American Spring Wire Corp. v. United States*, 8 CIT 20, 25, 590 F. Supp. 1273, 1277 (1984), *aff'd* 760 F.2d 249 (Fed. Cir. 1985) (ITC is obligated to consider pertinent economic data including health).

Commissioner Crawford's analysis of that issue assessed "the state of the industry when the LTFV imports were dumped with what the state of the industry would have been had the LTFV imports been fairly traded." *Final Determination* at 22, n. 125. She found, after an evaluation of all the relevant economic factors, "the domestic industry would not have been able to increase its prices had subject imports been priced fairly." *Id.* Her reasoning was largely based on the role played by non-subject imports which "would have competed [with the domestic industry] for any shift in demand away from higher priced fairly traded subject imports." *Id.* Indeed, as noted earlier, the importation of non-LTFV imports from China jumped from 286,000 units in interim 1995 to 507,000 units in interim 1996 (by 77%). *Final Determination* at IV–3, Table IV–1. Hence, the Commissioner concluded the domestic industry would have captured only part of any shift in demand away from fairly priced subject imports and any increase in output and sales would not have been material.

[23] Nevertheless, the Commission found that in spite of its minimal value, the information submitted by Plaintiff only corroborated the Commission's findings. The 33 domestic drum models allegedly facing the most competition from the subject imports contributed substantially to the producers' overall operating income and had positive operating results. *Final Determination* at 23, n. 127; Defendant's Confidential Appendix Doc. 28.

ity, capacity utilization, shipments, operating income and productivity rose during the period of investigation, and therefore, it did not abuse its discretion in reaching a negative determination.

B

THE ITC'S DETERMINATION THAT THE DOMESTIC BRAKE DRUM INDUSTRY IS NOT THREATENED WITH MATERIAL INJURY BY THE LTFV IMPORTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The ITC's determination of threat of injury is governed by 19 U.S.C. §1677(7)(F), which sets forth the economic factors that the Commission must consider in investigating such a threat. The statute states:

> In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant factors—
>
> (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase,
>
> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
>
> (VII) in any investigation under this subtitle which involves imports of both a raw agricultural product * * * and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),
>
> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

> (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i) (1994).

Of the foregoing factors, numbers I and VII are not applicable here because (I) there is no subsidy at issue, and (VII) no agricultural products, raw or processed, are involved. *Final Determination* at 24, n. 133.

It is also important to note that the list of factors is not exhaustive. The statute calls on the ITC to consider the enunciated criteria "among other relevant economic factors." 19 U.S.C. 1677(7)(F)(i)(1994). In making its threat determination, the ITC is required to consider the economic factors as a whole to determine whether further dumped imports are imminent and whether material injury would occur unless an order is issued. 19 U.S.C. § 1677(7)(F)(ii) (1994). "The presence or absence of any factor which the Commission is required to consider * * * shall not necessarily give decisive guidance with respect to the determination. Such a determination may not be made on the basis of mere conjecture or supposition." *Id.*[24]

Although the URAA made changes to section 771(7)(F)(ii) of the Tariff Act, "[t]his new language is fully consistent with the Commission's practice in making threat determinations, the existing statutory language which requires that threat determinations be based on 'evidence that the threat of material injury is real and that actual injury is imminent,' and judicial precedent interpreting the statute." SAA at 184, URAA, Legislative History, Vol. VI at 854; *Final Determination* at 24, nn. 131–32.

1

THE ITC FOUND THAT THE DOMESTIC INDUSTRY IS NOT THREATENED WITH MATERIAL INJURY

In the *Final Determination* the ITC unanimously concluded that the domestic aftermarket drum industry is not threatened with material injury by reason of LTFV imports from China. In examining each of the relevant statutorily specified factors, the Commission determined that the evidence does not indicate the likelihood of substantially increased volumes of LTFV brake drum imports. *Id.* at 24.

Despite significant increases in the LTFV brake drum capacity during the POI, and the export of an overwhelming majority of LTFV brake drums to the United States, the ITC found there is no likelihood of substantially increased subject imports into the United States. *Final Determination* at 24–25. This conclusion was buttressed by the fact that subject import volume and market penetration were lower in interim 1996 than in interim 1995. In addition, the ITC found dispositive the emphasis the Chinese producers gave to production for other markets,

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[24] The 1994 statutory threat of material injury determination "is subject to the same evidentiary requirements and judicial standard of review as a *present* material injury determination." SAA at 185, URAA, Legislative History, Vol. VI at 855 (emphasis in original).

and the capacity increases during the later portion of the POI which did not simultaneously give rise to an increase in exports of LTFV drums to the United States. *Id.* at 25.

The ITC also found, based on the reasoning in its material injury analysis, that since subject imports had no significant price effects on the domestic product at current import volumes, they were unlikely to have such effects in the imminent future. *Id.*

In addition, the ITC determined that subject brake drum inventories held in China are minimal. Moreover, although inventories of subject brake drums maintained in the United States increased over the POI, the ratios of these inventories to subject imports and to U.S. shipments were lower towards the latter portion of the investigation. *Id.*

Finally, the ITC found no information in the record indicating potential for product shifting or any other demonstrable adverse trends that indicate imminent material injury.

2

PLAINTIFF DID NOT SHOW THAT THE ITC FAILED TO CONSIDER EVIDENCE IN THE RECORD

Plaintiff challenges the ITC's findings, asserting that the

> ITC failed to consider or failed to state its reasons behind its analysis of the increasing capacity of the Chinese producers, the increasing volume of LTFV drums imports, the price depressing effects of the imports on the domestic industry, increasing inventories of imported drums both in the U.S. and in China, the potential for shifting drum production into rotor production * * * and underselling.

Plaintiff's Brief at 5–6.

An examination of the Commission's opinion shows that the ITC considered all the relevant economic factors required by the statute. Once again, Plaintiff is arguing that the ITC should have arrived at a different conclusion based on the factual foundation behind the analysis. Once again, the Court notes that as in a material injury determination, the ITC's threat determination "is afforded discretion in interpreting the data, and the court does not weigh the evidence." *U.S. Steel Group*, 18 CIT at 1224, 873 F. Supp. at 703 (citing *Bando Chem. Indus., Ltd. v. United States*, 16 CIT 133, 136, 787 F. Supp. 224, 226 (1992)). "[Court] review does not extend beyond determining whether the Commission has acted within its delegated authority and has correctly interpreted and applied the law." *Bando Chem. Indus., Ltd. v. United States*, 17 CIT 798, 802 (1993), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994).

Thus, a plaintiff bears the burden of proving that the challenged determination is unsupported by substantial evidence, *see Bando Chemical Industries, Ltd.*, 17 CIT at 802–803, and it is a burden that Plaintiff in this case fails to carry.

First, Plaintiff claims that the ITC failed to properly consider the increase in capacity for LTFV drums.[25] Plaintiff also asserts that the ITC failed to explain its "remote" conclusion that "there is also an increasing emphasis among Chinese producers to increase production for home market consumption and exports to third-country markets." Plaintiff's Brief at 24.

As discussed earlier, the ITC acknowledged the increase in capacity, but determined that in light of the prior history, the increase in capacity would not lead to a likelihood of substantially increased subject imports to the United States. More specifically, the ITC reasoned that significant capacity increases during the latter portion of the POI coincided with a decrease in subject drum volume and market penetration. For example, although capacity [ ] by [ ] units from interim 1995 to interim 1996, subject import volume and market penetration decreased from interim 1995 to interim 1996. Therefore, since little correlation existed between capacity increases in China and changes in subject import volumes during the POI, the ITC could not conclude the existence of additional capacity in China alone indicates a likelihood of substantially increased imports to the United States. *Final Determination* at 25. *See Calabrian Corp.*, 16 CIT at 354, 794 F. Supp. at 388 (strong indication of likelihood of injury in the near future is industry's present state); *see also* H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984) *reprinted in* 1984 U.S.C.C.A.N. 5220, 5291 (determination of threat requires careful assessment of identifiable current trends).

Moreover, in contrast to Plaintiff's claim, the ITC did not render its conclusion that Chinese producers are increasing production for other markets without foundation, but based its decision on the evidence presented in the record. *See Final Determination* at 25, n. 140. First, data submitted in response to the ITC questionnaires from the Chinese producers indicate a projected [ ] in exports to other markets from [ ] units in 1996 to [ ] in 1997. Defendant's Confidential Appendix at Doc. No. 33. Second, at the hearing, a witness testified to the significant growth in the automotive industry in China. Commission Hearing Transcript dated February 28, 1997 attached to Defendant's Non-confidential Appendix. Finally, the ITC relied on information submitted by Plaintiff in its prehearing brief which described the Chinese automotive industry's plan to "develop into a pillar industry of the national economy." Exhibit 9 of Plaintiff's Prehearing Brief attached to Defendant's Non-confidential Appendix. Therefore, the Court finds that the ITC reasonably concluded that the increase in capacity would not lead to a likelihood of substantially increased LTFV imports into the United States.

Next, contrary to Plaintiff's assertion that the ITC did not explain its reasoning for discounting the decrease in U.S. price, the effects of underselling, and the substitutability of the products, the ITC considered

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[25] Capacity increased from [ ] units in 1993 to [ ] units in 1994 then jumped to [ ] units in 1995. Interim 1995 amounted to [ ] units compared to [ ] units in interim 1996. Defendant's Confidential Appendix at Doc. 33 (thousands of units).

the evidence but did not find it likely that the subject drum imports will have significant depressing effects on domestic prices. *Final Determination* at 25. The ITC specifically referred to its findings involving underselling and substitutability discussed in its material injury determination. Since the ITC previously found that at current levels, the subject imports did not have adverse effects on domestic prices, the ITC found that there is no basis for concluding that "such price effects are likely to occur in the imminent future." *Final Determination* at 25.[26] *See Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers v. United States*, 17 CIT 233, 818 F. Supp. 376 (1993) (affirming no threat determination despite evidence of underselling since no indication of suppressing effect on U.S. prices); *Calabrian Corp.*, 16 CIT at 354, 794 F. Supp. at 388 ("A strong indication of the likelihood of material injury to an industry in the near future is its present state.").

Plaintiff protests the ITC's classification of inventories maintained in China as minimal. [However, an examination of inventories over total shipments results in only a negligible ratio.] *See U.S. Steel Group*, 873 F. Supp. at 702 (affirming no threat determination because, *inter alia*, Canadian inventory volumes were small as compared with total Canadian shipments). It was not unreasonable for the ITC to conclude that the level of inventories was minimal and therefore did not pose a threat to the U.S. industry. Moreover, as the ITC explained, although inventories of the subject imports in the United States increased over the POI,[27] the ratios of LTFV imports inventories to subject imports and to U.S. shipments of subject imports decreased from 1993 to 1995. *Final Determination* at 25. This decline in ratios indicated that there was no inventory buildup of subject imports in the United States.[28]

Plaintiff also contends that the ITC failed to substantiate its conclusion that no potential for product shifting existed given the fact that five of the brake drum producers also produce brake rotors.[29] Plaintiff states that "there are five producers who could potentially shift all of their resources from producing drums to producing the rotors * * *." Plaintiff's Brief at 28. The Court finds Plaintiff's contention lacks merit. Theoretically, if all five producers discontinued the production of brake drums and shifted their resources in order to produce more rotors, any potentially existing threat to the domestic brake drum industry would diminish. Instead, the ITC found no information in the record indicating any potential for product-shifting. *See Stalexport v. United States*, 19 CIT

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[26] Regarding the issue of substitutability, as discussed above, Commissioner Crawford explained that even if LTFV imports had been priced fairly, the domestic prices would not have increased and therefore the subject imports did not have significant effects on the domestic prices.

[27] Inventories increased from 134 units in 1993 to 301 units in 1994 and then to 354 units in 1995. Inventories for Interim 1995 amounted to 322 units compared to 404 units for interim 1996. *Final Determination* at VII–3 (thousands of units).

[28] The 1988 statute requires consideration of "any substantial increase in inventories of the merchandise in the United States." The Amended section now tracks more general references to inventories allowing the Commission to consider inventories of subject merchandise wherever they are located. SAA at 184, URAA, Legislative History, Vol. VI at 854.

[29] The ITC had previously made a material injury finding as to brake rotors.

758, 784, 890 F. Supp. 1053, 1074 (1995) (threat determination may not be based on conjecture or speculation).

Additionally, Plaintiff argues that the ITC failed to properly consider additional relevant adverse factors such as U.S. producers' statement of plans for production, an increase in Chinese drum capacity, underselling, product substitutability, and the financial loss of two U.S. drum producers.

The Court has already addressed the issues of increasing Chinese drum capacity, underselling and product substitutability and its reasoning and conclusions will not be repeated here. As to the U.S. producers' statements concerning future plans for production, Plaintiff claims that [the ITC ignored their statements relating to obstacles for future growth in its threat determination.] Defendant claims that Plaintiff mischaracterizes the producers' statements concerning actual and potential effects concerning plans for product development, capital raising and production efforts. Defendant argues that the producers' statements were [overly general in nature.]

The Court finds that the ITC reasonably limited the probative weight of Plaintiff's evidence here since [the statements did not rise to the level of specificity required.] *Cf. Alberta Pork Producers Marketing Board v. United States*, 11 CIT 563, 669 F. Supp. 445 (1987) (rejecting use of estimates that did not describe the specific product under consideration).

Finally, regarding the financial loss of the two U.S. drum producers, as discussed earlier, the ITC decided to limit the probative value of this evidence submitted by Plaintiff, and, in any event, the evidence actually supported the ITC's conclusion.

C

The Court Denied Plaintiff's Critical Circumstances Request As Moot.

Since the *Final Determination* of the Commission is affirmed and no material injury or threat of material injury is found as to brake drums from China, Plaintiff's request that the Court stay its determination as to critical circumstances is denied as moot.

IV

Conclusion

For the foregoing reasons, the court finds that the ITC's determination of no material injury and no threat of material injury is supported by substantial evidence and in accordance with law. Plaintiff's motion for judgment on the agency record is denied.

PUBLIC VERSION

(Slip Op. 98–82)

MITSUBISHI HEAVY INDUSTRIES, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND GOSS GRAPHICS, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 96–10–02292

[Final determination of sales at less than fair value sustained in part and remanded in part]

(Decided June 23, 1998)

Steptoe & Johnson (Anthony J. LaRocca, Carol A. Mitchell, Eric C. Emerson, Duncan B. Hollis and *Richard O. Cunningham); Gibson Dunn & Crutcher LLP (Daniel J. Plaine)* Attorneys for Mitsubishi Heavy Industries, Ltd.; *Perkins Coie LLP (Yoshihiro Saito* and *Mark T. Wasden)*, Attorneys for Tokyo Kikai Seisakusho, Ltd., for Plaintiffs.

Frank W. Hunger, Assistant Attorney General of the United States, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Of Counsel, *Robert J. Heilferty*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, and *Randi-Sue Rimerman*, Attorney, Department of Justice, Civil Division, Commercial Litigation Branch, for Defendants.

Wiley, Rein & Fielding, (Charles Owen Verrill, Jr., Alan H. Price, and *Willis S. Martyn III)* for Defendant-Intervenors.

OPINION

POGUE, *Judge:* Plaintiffs Mitsubishi Heavy Industries, Ltd. ("MHI") and Tokyo Kikai Seisakusho, Ltd. ("TKS"), respondents in the underlying investigation, and Plaintiff Goss Graphic Systems, Inc. ("Goss"), petitioner in the underlying investigation, filed separate motions challenging various aspects of the final determination of the International Trade Administration of the United States Department of Commerce ("Commerce" or "ITA") regarding imports of large newspaper printing presses ("LNPPs") from Japan. *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 61 Fed. Reg. 38,139 (Dep't Commerce 1996) (final det.)("Japan Final"), as amended by *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 61 Fed. Reg. 46,621 (Dep't Commerce 1996) (antidumping duty ord. and amendment to final det.). The motions were consolidated.

The antidumping investigation of LNPPs from Japan was conducted simultaneously with Commerce's investigation of sales of LNPPs from Germany. Issues common to both investigations were discussed in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany*, 61 Fed. Reg. 38,166 (Dep't Commerce 1996) (final det.) ("Germany Final"). The Court affirmed Commerce's determinations with respect to common issues of scope and standing. *Mitsubishi Heavy Indus. Ltd. v. United States*, 21 CIT ____, 986 F. Supp. 1428 (1997). Familiarity with the Court's opinion on scope and standing issues is assumed.

DISCUSSION

I. CONSTRUCTED EXPORT PRICE

In calculating a dumping margin, Commerce compares United States price to the normal value of the subject merchandise. United States price is calculated using either an export price ("EP") methodology or a constructed export price ("CEP") methodology.[1] Typically, Commerce relies on EP when the foreign exporter sells directly to an unrelated U.S. purchaser. CEP is used when the foreign exporter makes sales through a related party in the United States. *See Sharp Corp. v. United States*, 63 F.3d 1092, 1093–94 (Fed. Cir. 1995) ("The statute defines [U.S. price], * * * as either the United States purchase price [now EP] or the exporter's sales price [now CEP], whichever is appropriate * * *. Commerce uses the [CEP] if the foreign manufacturer imports through a related company in the United States.") (citations omitted).

For each of the relevant LNPP sales by MHI and TKS to the United States, Commerce calculated U.S. price based on a CEP methodology. TKS had reported its sales as CEP sales and therefore does not object to Commerce's methodology. However, MHI reported its sales as EP sales. MHI objects to Commerce's decision to reclassify all of its sales as CEP sales. MHI also objects to Commerce's decision to treat its installation costs as further manufacturing, Commerce's methodology for allocating general and administrative ("G&A") expenses for MHI's U.S. subsidiary, and Commerce's decision to deduct from U.S. price, indirect selling expenses incurred in Japan. Both TKS and MHI object to Commerce's refusal to grant a level-of-trade ("LOT") adjustment or CEP offset.

1. *Commerce's Decision to Base MHI's U.S. Price on CEP*

The antidumping statute defines EP as follows:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States * * *.

19 U.S.C. § 1677a(a) (1994). Constructed export price is defined as follows:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter * * *.

19 U.S.C. § 1677a(b).

When U.S. price is based on CEP, Commerce bases its calculations on the price charged to the first unaffiliated purchaser. This is the starting

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[1] Prior to the Uruguay Round Agreements Act, EP sales were designated purchase price sales, while CEP sales were designated as exporter's sales price sales. "Notwithstanding the change in terminology, no change [was] intended in the circumstances under which export price versus constructed export price are to be used." H.R. Rep. No. 103-826(I) at 79 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3851.

price. Commerce then makes certain adjustments including several that are not required for EP sales. The CEP adjustments "are made for certain amounts associated with the sale of merchandise in the United States, typically, commissions for selling the merchandise * * * and sales expenses generally incurred in selling the same type of merchandise in the United States." *PQ Corp. v. United States*, 11 CIT 53, 59, 652 F. Supp. 724, 730 (1987). The purpose of these adjustments is to prevent foreign producers from competing unfairly in the United States market "by spending amounts on marketing and selling their products that are in excess of what they spend in their home markets." *Id.* According to the Statement of Administrative Action to the URAA,[2] "constructed export price is * * * calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." H.R. Doc. No. 103–316 at 823 (1994) ("SAA").

The statute does not specify the circumstances under which Commerce is to choose EP or CEP. However, according to the SAA,

> [i]f the first sale to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser for export to the United States, is made by the producer or exporter in the home market prior to the date of importation, then Commerce will base its calculation on export price. If, before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter, then Commerce will base its calculation on constructed export price * * *.

Id. at 822–23.

Thus, a sale to an unaffiliated party made prior to importation and involving an importer affiliated with the producer or exporter could be either an EP or a CEP sale. In such a situation, "the determination of whether [EP] or [CEP] applies must be based upon additional circumstances." *PQ Corp.* at 60, 652 F. Supp. at 731. In *Certain Stainless Steel Wire Rods from France*, 58 Fed. Reg. 68,865 (Dep't Commerce 1993) (final det.), Commerce described the additional criteria it examines in deciding whether to use an EP or CEP methodology as follows:

> The first criterion is that the merchandise in question is shipped directly from the manufacturer to the unrelated buyer, without being introduced into the inventory of the related selling agent. The second criterion is that this arrangement is the customary commercial channel for sales of this merchandise between the parties involved. * * *

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[2] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *." SAA at 656. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.* (quoted in *Delverde, SrL v. United States*, 21 CIT ___, 989 F. Supp. 218, 230 n.18 (1997)). *See also* 19 U.S.C. § 3512(d)(1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

> The third criterion is that the related selling agent located in the United States acts only as a processor of sales-related documentation and a communication link with the unrelated U.S. buyer.

Id. at 68,868–69. Commerce will apply the EP methodology only if all three criteria apply to the sales at issue. *Id.* This test has been approved by this court. *See Independent Radionic Workers v. United States*, 19 CIT 375, 375 (1995)(describing Commerce's three criteria as "the judicially approved test").

At oral argument, counsel for MHI argued that Commerce's three-part test is incomplete because it does not focus on the key statutory distinction between EP and CEP.

The statute describes EP as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise *outside of the United States* to an unaffiliated purchaser in the United States * * *." 19 U.S.C. § 1677a(a)(emphasis added). CEP is described as the price at which the subject merchandise is first sold (or agreed to be sold) *in the United States* * * *." 19 U.S.C. § 1677a(b)(emphasis added). The inside/outside distinction between the two sections is critical, counsel argued, and therefore, Commerce's analysis must focus on the nature of the activities performed by MHI's U.S. subsidiary to determine whether the sales at issue occurred in the United States or in Japan.

Commerce's three-part test was created before the enactment of the URAA. Under the pre-URAA version of the statute, purchase price (now EP) was described as follows: "the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States. 19 U.S.C. § 1677a(b) (1988). Exporter's sales price (now CEP) was described as, "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *." 19 U.S.C. § 1677a(c) (1988). In distinguishing between purchase price and exporter's sales price sales, courts focused on the relationship between the foreign exporter and the importer rather than the date of sale. *See Smith-Corona Group v. United States*, 1 Fed. Cir. (T) 130, 132–33, 713 F. 2d 1568, 1572 (1983) ("Where the importer is an unrelated, independent party, purchase price is used * * *. Where the importer is related, an arm's length transaction does not occur until the goods are resold to a retailer or to the public. In that case, 'exporter's sales price' is used."). Commerce refined that distinction deciding that in cases in which all the criteria in its three-part test were met, a sale through a related U.S. importer would be considered a purchase price transaction. *See E.I. DuPont de Nemours & Co. v. United States*, 17 CIT 1266, 1281, 841 F. Supp. 1237, 1249 (1993) ("[S]ales to a related importer in the United States are usually exporter's sales price transactions. However, * * * when a sale to a related importer meets the additional criteria * * * it will be treated as a purchase price transaction.").

The purchase price and exporter's sales price provisions were changed by the URAA. The change most relevant to this issue, was the addition of the phrase, "outside of the United States," to the definition of EP (purchase price). However, that phrase follows the words, "by the producer or exporter of the subject merchandise." Therefore, it is not clear whether the phrase is meant to describe the location of the sale, or the location of the producer or exporter. Thus, the Court finds that the meaning of the phrase "outside of the United States," is ambiguous.

In the face of this ambiguity, the Court will defer to Commerce's interpretation if that interpretation is reasonable. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *Koyo Seiko Co. v. United States*, 36 F. 3d 1565, 1570 (Fed. Cir. 1994) ("[A] court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another."). In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole. In this case, the change in the language is also a significant factor. However, the implications of that change are not clear enough to convince the Court that Commerce's interpretation was unreasonable.

While the change in language may weigh against Commerce's interpretation of the U.S. price provisions other factors support Commerce's interpretation. The test Commerce relied on is longstanding and has been approved by this court. *Independent Radionic Workers*, 19 CIT at 375. Furthermore, the test reflects the courts' understanding that the key distinction between EP and CEP is the relationship between the exporter and the importer. Specifically, the three-part test eliminates from the CEP category those sales in which the role of the related U.S. importer is so minor, that the sales are, in reality, transactions between the foreign exporter and the unrelated U.S. purchaser. Finally, Commerce's decision to continue to rely on the three-part test is supported by the SAA, which states that "no change is intended in the circumstances under which export price (formerly 'purchase price') versus constructed export price (formerly 'exporters sales price') are used." SAA at 822–23. Here Commerce relied on a longstanding, judicially approved test that is consistent with the express terms of the statute. Commerce's interpretation of the statute was also supported by the SAA. Thus, Commerce's actions were in accordance with law.

Commerce applied its three-part test, relying on the third criterion in its decision to base U.S. price on CEP.

> [W]e reclassified all MHI sales as CEP/FM sales because MHI's affiliated U.S. sales agent acted as more than a processor of sales-related documentation and a communication link with the unaffiliated U.S. customers. The U.S. affiliate engaged in a broad range of activities including purchasing parts, warranty, technical

> services, and the coordination of installation, which we have classified as further manufacturing.

Japan Final, 61 Fed. Reg. at 38,141.

MHI argues that the activities undertaken by its U.S. affiliate could not justify Commerce's decision to rely on CEP rather than EP. "[The statute] contemplates using CEP not where U.S. selling activities are extensive but where an affiliate's selling activities *exceed* or *displace* those 'routine selling functions' an exporter would employ to make a direct sale." Brief Pl. MHI Reply Def's and Goss Graphic Systems, Inc.'s Response Briefs Comp. and Country-Specific Issues at 1 ("MHI Reply Brief") (citing *E.I. DuPont de Nemours & Co. v. United States*, 17 CIT 1266, 1282, 841 F. Supp. 1237, 1250 (1993)) (other citations omitted).

However, as Commerce explained, where all the criteria in the three-part test are met,

> the Department has regarded the routine selling functions of the exporter as "merely having been relocated geographically from the country of exportation to the United States," * * *. [W]here the functions are performed "does not change the substance of the transactions or the functions themselves."

Germany Final at 38,175 (citing *Certain Internal-Combustion, Industrial Forklift Trucks from Japan*, 53 Fed. Reg. 12,552 (Dep't Commerce 1988) (final det.)).

In this case, Commerce stated, "we believe that the various activities of MHI's subsidiary MLP were substantially more than 'routine selling functions.'" Germany Final at 38,176. Specifically, Commerce said, MLP was involved in the following areas: selling agency, after-sales servicing, sourcing of non-subject parts, and supervision of installation. "As MHI's principal sales agent in the United States, MLP was directly responsible for identification of Piedmont as a buyer, and cooperated with Sumitomo in the delegation of oversight for the Guard sale." *Id.* MLP also incurred warranty expenses for at least one sale and supervised installation through the work of its engineers for both sales.

Commerce has provided substantial evidence demonstrating that MLP did in fact carry out the activities listed. MHI's response to Commerce's supplemental questionnaire of Dec. 8, 1995 describes MLP's activities as follows:

> *Piedmont*: MLP identified the customer and served as a communications link between the customer and MHI. MLP was importer of record for this sale. MLP provided two engineers during installation of the press who assisted the MHI installation supervisors. MLP arranged for the purchase of the U.S. auxiliary parts required by the contract under the instruction and supervision of MHI. MLP personnel provided some of the technical services required by the Piedmont contract * * *.
>
> *Guard*: * * *. MLP was responsible for arranging for the installation of the press, and supplied two engineers to assist the MHI installation supervisors in the installation of the press. MLP arranged for the purchase of the U.S. auxiliary parts required by the

> contract under the instruction and supervision of MHI. MLP personnel provided warranty assistance * * *.

Response of Mitsubishi Heavy Industries, Ltd. to Dec. 8, 1995 Antidumping Supp. QR., Jan. 18, 1996 (N-P Doc. 115) at A–36. These activities went beyond the provision of "sales-related documentation" and communications with U.S. customers. They are, therefore, in excess of the routine selling functions an exporter would employ to make a direct sale. Thus, the Court finds Commerce appropriately treated MHI's sales as CEP sales.

2. *Further Manufacturing by MHI*

In calculating MHI's U.S. price, Commerce treated MHI's installation of the subject merchandise as part of further manufacturing "because the U.S. installation process involves extensive technical activities on the part of engineers and installation supervisors and the integration of subject and integral, non-subject merchandise necessary for the operation of LNPPs." Germany Final at 38,177. According to the statute, CEP is to be reduced by, "the cost of any further manufacture or assembly (including additional material and labor) * * *" 19 U.S.C. § 1677a(d)(2).

MHI maintains that installation expenses should have been treated as movement-related expenses, pursuant to 19 U.S.C. § 1677a(c)(2)(A), which requires Commerce to reduce EP and CEP by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses * * * which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States * * *."

The distinction is significant because Commerce calculates movement-related expenses without imputed profit. Further manufacturing costs, on the other hand, include an imputed profit attributable to the value added by the further manufacturing activities. *See* Mem. Pl. Mitsubishi Heavy Industries, Ltd. Support Mot. J. Agency R. Comp.-Specific Issues at 13 ("MHI brief").

MHI argues that prior to the URAA, the statute only permitted Commerce to deduct "any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise *after the importation of the merchandise and before its sale* * * *." *Id.* (citing 19 U.S.C. § 1677a(e)(3) (1988)). The current statute does not specify a time period within which the further manufacture or assembly must take place. However, MHI argues, "Congress made it clear, * * * that the new provision 'is not intended to effect any substantive change in the deduction made under the current statute for value added from processing or assembly in the United States' * * *." MHI Brief at 13–14 (quoting the SAA at 824). Because the assembly activities at issue here took place after the sale, MHI argues, they cannot be deducted as further manufacturing.

The Court does not agree. As MHI recognizes, the statute governing the instant investigation does not include any temporal restriction in the definition of further manufacturing. Furthermore, even before the

URAA took effect, Commerce treated activities occurring after the relevant sales as further manufacturing in certain cases. For example, in *Certain Small Business Telephone Systems and Subassemblies Thereof from Korea*, 54 Fed. Reg. 53,141, 53,151 (Dep't Commerce 1989)(final det.)(*"SBTS"*) the respondent argued specifically that installation occurred after the sale and therefore, could not be considered as value added. Commerce disagreed, explaining, "[w]hether this value is added before or after the sale is irrelevant because, for this product, [respondent's] customers expect the installed system to have the characteristics added by the non-subject merchandise." *SBTS* at 53, 151. The physical further manufacturing may have occurred after the sale, but the value added by that further manufacturing was reflected in the sale price of the merchandise. For this reason, SBTS was in accordance with the prior statute.

Commerce relied on the same reasoning in this case. "'Whether * * * value is added before or after the sale is irrelevant because, * * * customers expect the installed system to have the characteristics added by the non-subject merchandise.'" Germany final at 38,178 (quoting *SBTS* at 53,151.) Commerce's explanation is reasonable. LNPPs are custom made to order. Therefore, MHI's installation activities, including the addition of non-subject merchandise would all be included in the sales price of the LNPP agreed upon prior to importation. Furthermore, Commerce's interpretation of the statute has not changed from its pre-URAA interpretation. Therefore, Commerce's actions were consistent with the interpretation of the statute articulated in the SAA.[3]

MHI also argues that Commerce's decision was inconsistent with well-established agency practice. "[Commerce] has consistently acknowledged in the past that installation expenses incurred due to the need to move large industrial equipment from a manufacturing facility to the customer's site are movement-related expenses and should be treated as such in the dumping calculation." MHI brief at 14–15. Here, MHI asserts, "MHI's undisputed evidence showed that it manufactured LNPP components in Japan, assembled them there, tested them, then disassembled them for shipment to the United States * * *." *Id.* at 15.

In support of its argument that Commerce typically treats the costs of installing large industrial equipment as movement-related, MHI cites *Mechanical Transfer Presses from Japan*, 55 Fed. Reg. 335 (Dep't Commerce 1990)(final det.). In that case, Commerce treated installation expenses as movement charges, explaining,

> we have determined that these expenses should be treated as movement charges. Due to their large size, it is necessary to disassemble

[3] MHI also argues that "[t]his Court acknowledged that the deduction under section 772(e) was limited by statute to the time period 'after importation and before sale to an unrelated customer.'" MHI brief at 13 (citing *Ad Hoc Comm. of So. Calif. Producers of Gray Portland Cement v. United States*, 914 F. Supp. 535, 541 (1995)). That case is not persuasive on this issue. In that case, the court affirmed Commerce's decision to treat certain transportation costs as further manufacturing costs. The Court found that the transportation costs were "necessarily incurred in a process of manufacture performed on the merchandise * * *" and that, "the transportation costs are incurred during the relevant time frame, i.e. after importation and before sale to an unrelated customer." *Id.* It is not clear from the opinion whether the court would have decided the case differently if the activity at issue had occurred after the sale to the unrelated customer.

> MTPs [mechanical transfer presses] for shipment and delivery to the customer's facilities. Upon delivery to the customer's premises, the presses must be reassembled (installed) in order to function. Because disassembly and reassembly are necessary to deliver the merchandise, we have determined that installation and related supervision expenses are movement charges.

Id. at 339.

However, in other cases, particularly those in which assembly included the addition of non-subject merchandise, Commerce has treated assembly costs as further manufacturing. In *Certain Internal-Combustion, Industrial Forklift Trucks from Japan*, Commerce concluded that operations performed in the United States, including: "(1) Securing of certain options * * * to the units for shipment to customers, (2) attachment of lights, alarms, and hydraulic valves, and (3) swapping of [parts]" constituted further manufacture. 53 Fed. Reg. 12,552, 12,565 (Dep't Commerce 1988) (final det.). Similarly, in *SBTS*, Commerce treated the costs of integrating non-subject subassemblies with subject subassemblies and installation as further manufacturing. *See Id.* at 53,150. Based on the determinations cited above, the Court finds that Commerce has not established a consistent practice of treating installation costs as movement-related expenses. In the case now before the Court, Commerce stated,

> the Department has not applied a blanket rule on the treatment of installation expenses, sometimes treating them as assembly costs, a circumstance of sale adjustment or shipment expenses, depending on the particular circumstances involved. Where those circumstances include the incorporation of integral, non-subject components during installation or complex installation operations that are more than mere reassembly, the precedent clearly supports treatment of installation expenses as further manufacturing.

Germany Final at 38,177. Commerce distinguished the instant case from that in *MTPs*, explaining that,

> [i]n the investigation of *MTPs from Japan* * * * the Department treated installation expenses as a portion of shipment expenses, because installation consisted primarily of the reassembly of parts originally disassembled at the manufacturers domestic plant. The items added in the United States were accessories which were not integral to the functioning of the press.

Preliminary Concurrence Mem. at 14 (N-P Doc. 152). In the case of LNPPs, on the other hand, Commerce found that "the respondents' U.S. subsidiaries' roles in the sale, installation and servicing of LNPPs, and their supervision of the incorporation of integral, non-subject compo-

nents during installation, constitute a process that is more than mere reassembly."[4] Germany Final at 38,177.

Commerce's decision was consistent with the statute and did not violate any longstanding agency policy. Therefore, the Court finds Commerce's action to be in accordance with law.

3. *Allocation of General and Administrative Expenses for MHI*

In calculating the cost of MHI's further manufacture or assembly in the United States, Commerce allocated a portion of MLP's total general and administrative costs ("G&A") to the cost of installing the LNPPs. Commerce allocated the G&A expenses by calculating MLP's total cost of goods sold ("CGS") for both LNPP and commercial press operations and then allocating the G&A costs to MLP's LNPP installation costs based on the percentage of CGS attributable to MLP's LNPP operations.

Although MHI acknowledges that Commerce usually allocates G&A expenses based on CGS, in this case, MHI argues, Commerce's methodology overstated the amount of MLP's G&A expenses attributable to its LNPP installation. Specifically, MHI argues, it submitted substantial evidence to demonstrate that "[w]hile the resources devoted to the sale of LNPPs are small compared to commercial presses, the relative cost of LNPPs is large, thus distorting any methodology based on CGS." MHI Brief at 20. For these reasons, MHI maintains, Commerce should have used a headcount methodology to allocate MLP's G&A costs. In other words, MHI is arguing that Commerce should have based its G&A allocation on the relative number of personnel involved in MLP's LNPP operations.

MHI is not arguing that, as a general rule, Commerce's CGS methodology is inconsistent with the statute. The issue here is whether, as a factual matter, Commerce's methodology distorted its calculation of MLP's LNPP installation costs. In addressing factual issues, "[the court's] role is limited to deciding whether the Commission's decision is 'unsupported by substantial evidence on the record * * *.'" *Matsushita Elec. Ind. Co. v. United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984). In other words, the court must determine whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support [Commerce's] conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)(quoted in *Matsushita*, 3 Fed. Cir. (T) at 51, 750 F.2d at 933).

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[4] MHI does not dispute that parts were added to the subject merchandise during the installation process. *See* MHI brief at 18 ("[W]hether or not the parts procured in the United States were 'integral' to the operation of a press, MHI's evidence demonstrated that those parts were sourced in the United States simply to save the shipment costs of sending them to Japan for re-export to the United States.") The reason for MHI's decision to purchase certain parts in the United States is not relevant to this Court's decision. Commerce's practice has been to classify installation as further manufacturing when that installation included the addition of integral, non-subject components. That practice is in accordance with law.

Here, Commerce explained,

> [o]ur methodology recognizes the fact that the G&A expense category consists of a wide range of different types of costs which are so unrelated or indirectly related to the immediate production process that any allocation based on a single factor (e.g., headcount) is purely speculative.

Japan Final, 61 Fed. Reg. at 38,149.

In verifying the information submitted by MHI, including information regarding the range of activities undertaken by MLP, Commerce found substantial evidence demonstrating that for LNPPs, as well as commercial presses, MLP "sells, installs and services" the presses, purchases certain components in the United States and installs the press at the customer's plant. Verification of Constructed Value Data at 36. That MHI "can point to evidence of record which detracts from * * * [Commerce's] decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive." *Matsushita*, 3 Fed. Cir. (T) at 54, 750 F. 2d at 936. Commerce provided evidence demonstrating that a wide range of functions are performed for both commercial presses and LNPP, and that these functions require a wide range of costs, beyond personnel. Therefore, Commerce's decision to allocate G&A expenses based on a CGS rather than a headcount methodology was appropriate.

4. *Indirect Selling Expenses Incurred in Japan for MHI*

The CEP provision requires that Commerce reduce the price of the first sale to an unaffiliated customer in the United States by the amount of selling expenses "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise * * *." 19 U.S.C. § 1677a(d)(1). Indirect selling expenses are a component of selling expenses. *See* 19 U.S.C. § 1677a(d)(1)(D) (requiring that Commerce deduct from CEP any selling expenses not deducted as commissions or direct selling expenses). As part of indirect selling expenses, Commerce included expenses incurred in Japan to support U.S. sales. MHI argues that Commerce should have deducted only those indirect selling expenses incurred by MLP in the United States.

The CEP methodology is intended to determine a U.S. price "calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." MHI brief at 21 (quoting SAA at 823). "Accordingly, when ITA makes its CEP adjustments to U.S. price, its objective is to identify indirect selling expenses that would not exist in an EP sale and deduct those expenses * * *." *Id.* at 22. MHI contends that Commerce should not have deducted expenses incurred by MHI in Japan "for * * * activities that were fully consistent with an EP transaction." *Id.*

However, once Commerce has decided to rely on CEP, the statute does not require that Commerce examine every potential CEP deduction to determine whether the activity generating the expense would be incon-

sistent with an EP transaction. The statute contains a list of mandatory deductions, which includes selling expenses incurred in selling the subject merchandise. The statute does not specify as to the location of the activities generating these expenses. Here, Commerce deducted all indirect selling expenses related to respondents' United States sales. This decision was consistent with the statutory CEP provision.

MHI makes a second argument, that the SAA specifically limits CEP deductions to "expenses (and profit) associated with economic activities occurring in the United States." SAA at 823. MHI interprets this provision to require that the activities generating the deducted costs must occur in the United States. However, MHI's reading is too narrow. Expenses incurred outside of the United States could still be "associated with" economic activities occurring in the United States. Commerce's approach limited the deductions to those indirect selling expenses "directly associated" with U.S. economic activity. Germany Final at 38,174. Thus, Commerce's application of the statute was limited enough to be consistent with the interpretation of the statute articulated in the SAA.

The petitioner, Goss, objects to Commerce's allocation of respondents' indirect selling expenses incurred in Japan and Germany, arguing that "Commerce undervalued these expenses by deducting only that portion of the indirect selling expenses attributable to U.S. sales when calculating the CEP." Brief Support Goss Graphic Systems, Inc. Rule 56.2 Mot. J. Agency Rec. Comp./Country-Specific Issues at 6 ("Goss brief").

The Court will not address Goss' argument at this time, because in reviewing its allocation of indirect selling expenses to U.S. sales, Commerce came to the conclusion that its methodology overstated the amount of indirect selling expenses to be deducted from CEP. Specifically, Commerce explained that the pool of indirect selling expenses incurred in the home market and allocated to MHI's U.S. sales included "various office and planning expenses * * *. [that] are not the type of expenses that ordinarily would be associated with United States economic activity." Response Court's April 21, 1998 Ord. Regarding Treatment Indirect Selling Expenses at 2.

In *Koyo Seiko Co. v. United States*, the Court observed that "[t]here can be no doubt that Congress intended final determinations to be precisely that." 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). However, the court added, "failure to reopen a determination which is known to be based on erroneous factual information that would clearly mandate a change in result would itself be arbitrary and capricious." *Id.* at 683, 746 F. Supp. at 1111 (citing *Timken Co. v. United States*, 7 CIT 319, 320 (1984)). *See also Federal-Mogul Corp. v. United States*, 18 CIT 1168, 1171–72, 872 F. Supp. 1011, 1014 (1994) (granting Commerce's request for remand to correct "inadvertent" factual errors).

As stated above, indirect selling expenses must be associated with economic activity occurring in the United States. Commerce erred by deducting certain expenses that were not so associated. Therefore, the

Court will remand this issue, pursuant to Commerce's request, in order that Commerce may correct its error. Upon remand, Commerce will evaluate whether its allocation methodology either understates or overstates respondent's indirect selling costs. Commerce must also respond to TKS's argument that Commerce overstated its indirect selling expenses in the same way it overstated MHI's.

5. The CEP Offset for MHI and TKS

MHI and TKS both contend that they were entitled to a CEP offset, pursuant to 19 U.S.C. § 1677b(a)(7)(B):

> When normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine * * * a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product * * *.

Commerce declined to grant the adjustment because, "[i]n this instant investigation, the respondents failed to provide the Department with the necessary data for the Department to consider an LOT [level-of-trade] adjustment * * *. Absent this information, the Department cannot determine whether an LOT adjustment is warranted, nor whether the level of trade in the home market is in fact further removed than the level of trade in the United States." Japan Final at 38,143.

As the SAA makes clear, "if a respondent claims an adjustment to decrease normal value, as with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment." SAA at 829. In this case, Commerce concluded that neither TKS nor MHI had provided sufficient information to demonstrate the appropriateness of the CEP offset. Specifically, Commerce said,

> [r]espondents now contend that there is one home market level of trade to which CEP is being compared, but this claim is not well substantiated. The information we have on the record for sales in the home market does not support this conclusion. * * *. For neither TKS nor MHI can we ascertain which selling functions are performed by them and which are provided by leasing companies, trading companies or other entities for each type of home market sale. Thus the minimal amount of information provided does not support the conclusions reached by respondents.

Japan Final, 61 Fed. Reg. at 38,143.

Commerce's conclusion was based upon substantial evidence. *See* MHI QR Response at A–17 to A–22 (describing only in general terms the functions of MHI and its affiliated and non-affiliated trading companies in MHI's home-market sales). For TKS *see* TKS QR Response (N-P Doc. 39) at A–30 (failing to explain role of leasing company discovered at verification to have been involved in at least one TKS home-market sale). *See also* TKS Verification Report (N-P Doc. 191) at 18) ("For this sale * * * the original customer * * * requested that its purchase be trans-

ferred to a leasing company, * * * which resulted in the issuing of a new purchase order * * *."). In the absence of sufficient information, Commerce's refusal to grant either an adjustment or a CEP offset was appropriate.

MHI also complains that "[n]ot once in the investigation did ITA advise MHI that it believed MHI's filings to be deficient" in establishing MHI's right to a CEP offset. MHI Brief at 26–27. However, Commerce had no obligation to give MHI such a warning.

In its Section A questionnaire, Commerce explicitly requested all information relevant to a LOT analysis. Specifically, Commerce explained,

> [t]he description you provide of your channels of distribution and sales process * * * is intended to provide the Department with the information necessary to make appropriate comparisons of sales at the same level of trade or to adjust normal value, if appropriate, when sales are compared at different levels of trade. Your response to this section may be of critical importance to this investigation. Accordingly, your response should include all the information requested and all information you believe the Department should consider in making a comparison * * *.

ITA Section A QR (Pub. Doc. 73) at A–10. Thus, Commerce gave MHI ample opportunity to present such information.

TKS argues that it did not claim a level of trade adjustment until the final stage of the investigation because Commerce did not decide to deduct Japan-based indirect selling expenses until after it issued its preliminary determination. Mem. Pl. Tokyo Kikai Seisakusho, Ltd. Support Mot. J. Agency R. Comp.-Specific Issues at 31 ("TKS brief"). "The CEP offset was necessary in that event, because home market sales would be at a more remote stage of distribution than CEP sales." *Id.* at 31–32. As with MHI, however, TKS had ample opportunity to provide Commerce with level of trade information. In the absence of such information, Commerce was justified in refusing to grant either a level of trade adjustment or CEP offset.

II. Imputed Credit Expense

1. *Imputed Credit Prior to Shipment*

In calculating both normal value and U.S. price, Commerce made a circumstance-of-sale adjustment for credit expenses incurred during production of the subject merchandise, prior to shipment, pursuant to 19 U.S.C. § 1677b(a)(6)(c).[5] Commerce's usual imputed credit calculation is based only on the cost of financing receivables between shipment date and payment date. Germany Final at 38,187.

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[5] Section 1677b(a)(6)(C) requires that in calculating normal value, Commerce shall adjust the price of the foreign like product by "the amount of any difference between the EP or CEP and the price [of the foreign like product] * * * that is * * * wholly or partly due to * * * differences in the circumstances of sale."

MHI concurs in the argument presented by MAN Roland,[6] a respondent in Commerce's Germany investigation, that Commerce's adjustment for pre-shipment credit expense is "flatly inconsistent with the Department's past decisions regarding the types of items for which a circumstance-of-sale adjustment can be made," and that "[i]n past cases, the Department has specifically held that a circumstance-of-sale adjustment cannot be made for production costs." MAN Roland Brief at 11–12.[7]

Furthermore, Man Roland argues, "it is fundamentally illogical to treat the imputed cost of financing production as a selling expense, or as part of the adjustment for credit expenses." *Id.* at 13. The credit expense, MAN Roland argues "is simply a tool for measuring the effect of * * * payment terms on the real economic price paid by the customer * * * if MAN Roland allows its customers to pay later, the economic value of the payment it receives is less." *Id.* The imputed cost of financing production, MAN Roland argues, "has no effect on the price paid by the customer. Rather, it depends on MAN Roland's internal production scheduling decisions." *Id.* at 14.

The statute requires that constructed value be "increased or decreased by the amount of any difference * * * between the [U.S. price] and [constructed value] * * * that is established to the satisfaction of the administering authority to be wholly or partly due to * * * differences in circumstances of sale." 19 U.S.C. § 1677b. The statute does not define the term circumstance of sale. Thus, Commerce has broad discretion in determining what constitutes a circumstance of sale. *See Sawhill Tubular Div. Cyclops Corp. v. United States*, 11 CIT 491, 497, 666 F. Supp. 1550, 1555 (1987) ("It is * * * clear that Congress has deferred to the expertise of the agency and vested broad discretion in it to make adjustments for the differences in the circumstances of sale * * *."). That discretion, however, is limited. "One recognized limitation upon this power is that adjustment be made for those factors and conditions which have a direct bearing on or relationship to the sales under consideration." *Id.*

In the final determination, Commerce explained,

> We believe that it is appropriate in this instance to recognize the comprehensive financing arrangement for each sale as a circum-

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[6] Commerce argues that MHI may not raise this argument because it failed to raise it at the administrative level. The Court does not agree. According to the statute, "the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (emphasis added). "In light of this quoted language, Congress did not intend § 2637(d) to be jurisdictional in nature." *Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372, 376, 661 F. Supp. 1206, 1209 (1987) (citing *United States v. Priority Prods., Inc.*, 4 Fed. Cir. (T) 88, 92–93, 793 F.2d 296, 300 (1986)) (other citations omitted). Thus, "[i]t is within this court's discretion to determine whether the particular manner of failure to exhaust administrative remedies warrants preclusion of consideration of the new issue." *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 136, 583 F. Supp. 607, 611 (1984). The exhaustion doctrine reflects a "respect for values of judicial economy and 'administrative autonomy.'" *Al-Tech*, 11 CIT at 377, 661 F. Supp. at 1210 (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)). Permitting MHI to raise this issue would not conflict with those values. Commerce had ample opportunity to respond to this question at the administrative level, where it was raised by MAN Roland.

[7] MAN Roland also argues that Commerce's actions were inconsistent with cases decided subsequent to the determination at issue here. Commerce has no obligation to act consistently with subsequent decisions. If the cases are inconsistent, it would be incumbent upon Commerce to explain why its subsequent decisions were inconsistent with this one.

> stance of sale adjustment. LNPPs require substantial capital expenditures over an extended time period because of their size and lengthy production process * * *. Moreover, the projects generally call for the purchaser to provide scheduled progress payments before completion of a project. Our normal imputed credit calculation * * * does not measure the effect of progress payments made relative to production costs incurred. To adjust sales prices for the effect of the respondent incurring significant capital outlays at the beginning of a project * * * or receiving large sums of money up front * * * we calculated imputed credit for each home market and U.S. sale * * *.

61 Fed. Reg. at 38,187. Commerce calculated imputed interest by subtracting progress payments from capital outlays made during the construction period and then multiplying the balance by the applicable interest rate. *See* Mem. Re: Constructed Value, Further Manufacturing and Constructed Export Price Adjustments for Final Det., N-P Doc. 107 at 4. Commerce's treatment of the imputed interest as a circumstance of sale allowed it to fully recognize the complexity of the financing arrangements at issue here. Given that construction on a single sale in this case may take several years to complete, as well as the fact that financing arrangements may vary widely from sale to sale, the Court finds Commerce's decision to treat the imputed interest expenses as a circumstance of sale was reasonable.

MAN Roland argues that Commerce's actions here were inconsistent with its actions in *Zenith Elec. Corp. v. United States*, 18 CIT 870 (1994). In *Zenith*, Commerce made a circumstance of sale adjustment for respondent's imputed credit expense. However, Commerce refused to offset the imputed credit expense—based on "the average duration of accounts receivable,"—by "the average duration of accounts payable." *Id.* at 875. Commerce explained,

> by allowing the customer a period of time to pay, the seller effectively reduces the sales price of the merchandise because of the time value of money * * *. To the extent that a manufacturer can delay paying its suppliers, the cost of materials is reduced by the time value of money, resulting in a saving in the cost of production. Since accounts payable are, thus, production costs, they cannot result in a circumstance-of-sale adjustment.

Id. at 875, n.8. Commerce explained further, that it could not treat accounts payable as a circumstance of sale adjustment because doing so "would require us to adjust for factors relating to cost of production, which are unrelated to the *sales* at issue." *Id.* In this case, unlike *Zenith*, Commerce made the imputed interest adjustment to compensate for different payment schedules by customers to respondent. Thus, the adjustment was directly related to the sales at issue and appropriately treated as a circumstance of sale.

2. *The currency of the imputed credit expense*

Even if the Court finds Commerce's pre-shipment imputed credit adjustment to be appropriate, MHI argues, Commerce erred in using a dol-

lar-denominated interest rate for financing production of presses for U.S. customers and a yen-denominated rate for home market presses.

According to MHI,

> [a]ny production financing costs incurred by MHI, however, did not vary based on the nationality of the customer or the currency in which a particular contract was denominated. Indeed there is *no* evidence on the record that MHI borrowed more expensive dollars to finance production of presses just because those presses were destined to U.S. customers, nor would such an assumption make commercial sense.

MHI Brief at 31. For this reason, MHI argues, Commerce's action violated "the clear instruction of the Court of Appeals of the Federal Circuit that credit expenses must be 'imputed on the basis of usual and reasonable commercial behavior.'" MHI Brief at 31 n.107 (citing *LMI-LaMetalli Industriale, S.p.A. v. United States*, 8 Fed. Cir. (T) 157, 163, 912 F. 2d 455, 461 (1990)).

MHI makes a similar argument with regard to Commerce's use of a U.S. dollar interest rate to calculate MHI's imputed credit expense incurred after shipment but before payment. MHI relies on *LMI* for the proposition that "where a foreign seller has access to financing at a low interest rate, and there is evidence that the seller can take advantage of that less expensive financing, it is unreasonable to base imputed credit expense on some other higher interest rate." MHI Brief at 32. Here, MHI argues, the U.S. interest rate was significantly higher than the corresponding yen-denominated interest rate. "Accordingly, it would have made no commercial sense for MHI to finance its receivables in more expensive dollars, and the record shows that MHI did not engage in such conduct." *Id.* at 33.

MHI's reliance upon *LMI* is misplaced. In *LMI*, as in cases decided prior to *LMI*, Commerce based imputed credit on the respondent's actual cost of borrowing, or in the absence of actual borrowing, respondent's theoretical cost of borrowing. The *LMI* court held that the theoretical cost of borrowing must be based on commercial reality. Commerce's current practice, however does not focus on the cost of borrowing, but on the currency in which the sale is denominated. As Commerce explained,

> A company selling in a given currency * * * is effectively lending to its purchasers in the currency in which its receivables are denominated * * *. Thus, when sales are made in, and future payments are expected in, a given currency, the measure of the company's extension of credit should be based on an interest rate tied to the currency in which its receivables are denominated.

Japan Final at 38,160 (citing *Oil Country Tubular Goods from Austria*, 60 Fed. Reg. 33,551, 33,555 (Dep't Commerce 1995) (final det.).

The circumstance of sale provision does not specify the currency in which imputed credit expenses are to be calculated. Thus, the Court will defer to Commerce's permissible interpretation of the statute. Here, the Court finds, Commerce's interpretation was reasonable. "The imputation of credit cost is based on the principle of the time value of money."

LMI at 460. Commerce's decision that imputed credit should reflect the time value of the currency in which the transaction is actually carried out was reasonable, as it reflects the actual benefit to the buyer and the loss to the seller that results from delaying payment.[8]

3. *Deduction of Imputed Credit Expenses from Normal Value*

In addition to deducting imputed credit expense from United States price, Commerce adjusted normal value by deducting an amount for imputed credit. Petitioner objects to this deduction.

In the underlying investigation, Commerce based normal value on constructed value ("CV")pursuant to its authority under 19 U.S.C. § 1677b(a)(4)[9]. Goss argued that Commerce should have added an amount for imputed credit expense to respondents' CV. Only then, Goss argued, would the imputed credit deduction have been appropriate. Japan Final at 38,147. However, Commerce explained, the statute requires that Commerce "include in CV the actual amount of SG&A expenses * * * incurred by the exporter or producer. Imputed credit is, by its nature, not an actual expense. Therefore, we did not include imputed credit in the CV calculation for the final determination." *Id.* at 38,147.

Goss now argues, "[t]he constructed value is based on the actual costs of production that, by their nature, cannot include an imputed credit expense. Therefore, adjusting [normal value] for an imputed credit expense defies common sense—there is no credit expense to deduct." Goss Brief at 2.

In the final determination, Commerce did not specifically address the issue raised by Goss, whether normal value may be adjusted for an imputed credit expense when normal value is based on constructed value.

According to the statute, a normal value that is based on constructed value is subject to the same adjustments as normal value based on home-market or third-country sales. 19 U.S.C. § 1677b(a)(8). One of these adjustments is the circumstance-of-sale adjustment. *See* 19 U.S.C. § 1677b(a)(6)(C). Commerce describes the imputed credit adjustment as a circumstance-of-sale adjustment. Germany Final at 38,187.

In its final calculation memorandum, Commerce explains that it adjusted both United States price and normal value for imputed credit. In its brief to this Court, Commerce explains that it subtracted imputed credit from both sides of the margin calculation in order that the two might be calculated on an equal, i.e. net-imputed-credit, basis. Def.'s Mem. Opp. Pls.' Mot. J. Admin. Rec. at 57 ("Commerce brief").

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[8] MHI also argues that Commerce's statement that its use of a dollar-denominated interest rate "was intended to account for 'the effect of currency fluctuations on repatriating revenue,'" constitutes evidence that Commerce's actions were inconsistent with the statute. MHI Brief at 33 (quoting Japan Final at 38,160). "The statute, * * * could not be clearer on this issue: 'Fluctuations in exchange rates shall be ignored.'" *Id.* (citing 19 U.S.C. § 1677b-1(a)). Commerce's statement regarding currency fluctuations does not alter the fact that Commerce gave a reasonable explanation for its decision to base imputed credit expense on the currency of the transaction at issue. Furthermore, Commerce did not change its practice in any way to adjust for currency fluctuations. Therefore, Commerce's action did not violate the statute.

[9] 19 U.S.C. § 1677b(a)(4) provides, "[i]f the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(i) [based on home-market sales], then, * * * the normal value of the subject merchandise may be the constructed value of that merchandise * * *."

However, Goss contends that normal value was on a net-imputed-credit basis prior to Commerce's adjustment. "The imputed credit cost in this case reflects differences in timing between receipt of payments and expenditures for production. Therefore, the constructed value cannot include imputed credit expenses—it is only the sum of actual costs and has no payment schedule associated with it." Goss Brief at 5.

In its brief, Commerce explains that under the current statute, profit for constructed value is calculated based on respondents' actual profit amounts on home-market sales. "By using the actual profit, the CV reflects a foreign value unadjusted for imputed credit." Commerce brief at 57. In other words, Commerce is saying that when an actual profit is used, imputed credit is reflected in the profit amount.

However, the Court cannot sustain Commerce's actions based on post hoc rationalizations by agency counsel. *See Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983) ("[T]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action. * * * It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citations omitted). Therefore, the Court is remanding so that Commerce may explain its decision on the record.

III. Constructed Value Issues

Commerce based normal value on constructed value, reasoning that while home market sales of the foreign like product were "viable" (i.e., sufficient in volume), pursuant to 19 U.S.C. § 1677b(a)(1)(C)[10], the market situation was characterized by "(1) a unique demand pattern prevalent in each national market; (2) unique technical specifications required for each highly customized LNPP sold; and (3) very low volume of individual LNPP sales in the normal business cycle." Commerce Brief at 14. Commerce's decision to rely on constructed value is not challenged here.

1. *Computation of SG&A and Profit*

In constructing the value of the subject merchandise, Commerce requested information from respondents regarding their selling, general and administrative costs ("SG&A") and profit for home market sales. Rather than using respondents' reported profit margins, however, Commerce asked respondents to report contract price and production cost data for their home market sales of LNPPs. ITA Concurrence Mem.: Prelim. Det.—Antidumping Duty Investigation of LNPPs from Japan (N-P Doc. 152) at 9–10 ("Preliminary Det. Concurrence Mem."). Commerce used this information to calculate SG&A and profit amounts to be used for constructed value.

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[10] Section 1677b(a)(1)(C)(ii)requires that if Commerce determines "that the aggregate quantity * * * of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States * * *" Commerce should calculate normal value on a basis other than home-market sales. 19 U.S.C. § 1677b(a)(1)(B) and (C).

A. Treatment of Below-Cost Sales

According to Commerce, the cost data submitted by respondents "indicated that there were below-cost sales made in the home market * * *." Japan Final at 38,145. In calculating profit and SG&A expenses from the reported data, Commerce excluded such below-cost sales. MHI and TKS object to Commerce's exclusion of below-cost sales.

MHI argues that Commerce had no authority to collect detailed cost information solely for its calculation of SG&A and profit amounts. "The scheme established by Congress was to have [Commerce] rely on sales-specific data *if it had been collected for some other purpose*, but otherwise to use respondents' financial reports or other available information." MHI Brief at 34.

Typically, Commerce collects sales-specific cost data for home-market sales in cases in which normal value is based on home-market sales. According to the statute, "[w]henever the administering authority has reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production * * *, the administering authority shall determine whether, in fact, such sales were made at less than the cost of production. 19 U.S.C. § 1677b(b)(1). The statute specifies that "[t]here are reasonable grounds to believe or suspect" below-cost sales, if "an interested party * * * provides information, based upon observed prices or constructed prices or costs, that sales of the foreign like product * * * have been made at prices which represent less than the cost of production of the product * * *." 19 U.S.C. § 1677b(b)(2)(A)(i).

Although Commerce received a below-cost allegation from petitioners in this case, it did not formally initiate a cost investigation because it had decided to base normal value on constructed value rather than home-market sales. Japan Final at 38,144–45.

MHI argues that in the absence of a formal below-cost investigation, Commerce was obligated to use profit data provided by MHI from its financial statements. "When Congress enacted the new profit-related provisions in 1994, it did not give ITA new authority to conduct cost investigations." MHI Brief at 34. In support of its position, MHI cites 19 U.S.C. § 1677b(e)(2) which provides that in calculating constructed value, Commerce shall use "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation * * * for selling, general and administrative expenses, and for profits, * * *," 19 U.S.C. § 1677b(e)(2)(A), but that if such data "are not available," then Commerce is to rely on one of three alternatives. 19 U.S.C. § 1677b(e)(2)(B). Commerce relied on section 1677b(e)(2)(A) for calculating SG&A using "the actual amounts incurred and realized." MHI argues that Commerce should have relied on one of the three alternatives. In essence, MHI is arguing that if cost data has not been collected for some other purpose, then it cannot be considered to be "available."

The Court finds MHI's interpretation of the statute to be overly narrow. The statute does not define the term "available." Thus, the Court will defer to Commerce's interpretation of the term if it is reasonable. Here, Commerce reviewed MHI's questionnaire response and determined that a sufficient number of home-market transactions had occurred, that the company had cost information about those transactions in its records and that the company could provide such information to Commerce. Commerce decided that these facts in combination were sufficient to render the requisite information available.

Commerce's decision represents a reasonable application of the statute. The SAA states that the alternative methodologies established by section 1677b(e)(2) are to be used "in those instances where the method described in section [1677b(e)(2)(A)] cannot be used, either because there are no home-market sales of the foreign like product or because *all* such sales are at below-cost prices." SAA at 840 (emphasis added). Commerce determined that neither of these circumstances existed here, and therefore, the information was available.[11]

TKS argues that Commerce's decision to conduct a "de facto" cost test rather than initiating a formal below-cost investigation was inconsistent with the statutory requirement that Commerce have "reasonable grounds to believe or suspect that sales of the foreign like product * * * have been made at prices which represent less than the cost of production * * *." 19 U.S.C. § 1677b(b)(1).

Rather than responding to Goss's below-cost allegation, TKS complains, Commerce elected to conduct a "de facto" cost test on home market sales.

"[Commerce] has justified its *de facto* cost test by claiming that the home market price and cost data submitted by TKS showed below-cost sales, *viz.*, provided reasonable grounds to suspect below-cost sales." TKS Brief at 11. Commerce's actions were unlawful, TKS argues, because Commerce's below-cost test was not based on reasonable suspicion as defined by the statute. Therefore, TKS argues, Commerce should not have excluded below-cost sales.

Like MHI, TKS reads the statute's requirements too narrowly. Commerce is to calculate SG&A and profit for constructed value using only those sales of the foreign like product that were made *in the ordinary course of trade*. 19 U.S.C. § 1677b(e)(2)(A). The statute defines sales and transactions considered outside the ordinary course of trade to include "among others," sales disregarded under section 1677b(b)(1). 19 U.S.C. § 1677(15).

Based on the sales data gathered by Commerce to calculate SG&A and profit, Commerce determined that certain sales would have been excludable under 19 U.S.C. § 1677b(b)(1) had Commerce decided to base normal value on home-market sales and carry out a below-cost inves-

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[11] MHI quotes a different section of the SAA in support of its argument that Commerce was not entitled to collect the sales information. *See* MHI Brief at 34 n.119 (citing SAA 824–25). However, the section of the SAA that MHI cites concerns the calculation of profit for CEP. Therefore, this section is not applicable to Commerce's calculation of SG&A and profit in determining normal value.

tigation. Commerce's decision to treat such sales as outside the ordinary course of trade, relying on the "among others" language of section 1677(15) was a reasonable application of the statute.

Although the sales were not discovered in the type of investigation prescribed by section 1677b(b)(1), Commerce found that the sales did have the characteristics of a sale that would be excludable under 1677b(b)(1). Congress mandated that sales with those characteristics be treated as "outside the ordinary course of trade" for purposes of calculating normal value. *Id.* Therefore, it was reasonable for Commerce to treat such sales as outside the ordinary course of trade for purposes of calculating SG&A and profit.

MHI also argues that Commerce did not have the authority to disregard below-cost sales without formally initiating a cost investigation.

> Formal cost investigations exist so that respondents have notice that information in a respondent's defense should be submitted to [Commerce] for consideration. In this case, because a cost investigation was never initiated, MHI was never on notice that it should provide data showing that it could recover its costs over time. By conducting an 'informal' cost investigation, ITA usurped a procedural protection afforded respondents under the Act.

MHI Brief at 35. According to the statute, "[i]f prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production for the period of investigation * * * such prices shall be considered to provide for recovery of costs within a reasonable period of time." 19 U.S.C. §1677b(b)(2)(D).

As explained above, Commerce was not required to initiate a formal below-cost sales investigation in order to exclude below-cost sales from its profit and SG&A calculations. Commerce's failure to do so did not deprive MHI of any procedural protection. Commerce requested and received complete cost information for all home-market sales that took place during the investigation. Based on this information, Commerce determined that certain sales had been made at below-cost prices. Because Commerce treated each individual sale as a separate model,[12] Commerce knew that for any specific model, cost-recovery over time would not be possible. By definition, there was only one sale for each model. Therefore, Commerce reasonably determined that MHI would not be able to recover its costs on below-cost sales during the period of investigation, as the statute requires. No information provided by MHI could have altered this conclusion.

2. *The Model-Specific Cost Test*

Under 19 U.S.C. § 1677b(b)(1), below-cost sales may be excluded only if they "have been made within an extended period of time in substantial quantities," and "were not at prices which permit recovery of all costs within a reasonable period of time * * *." 19 U.S.C. § 1677b(b)(1)(A), (B). The statute also states that "[s]ales made at prices below the cost of

[12] *See* section 2, *infra*.

production have been made in substantial quantities if—(i) the volume of such sales represents 20 percent or more of the volume of sales under consideration for the determination of normal value * * *." 19 U.S.C. § 1677b(b)(2)(C).

Commerce typically conducts the substantial quantities test on a model-specific basis. In other words, if below-cost sales represent 20 percent or more of the volume of sales of a specific model of subject merchandise, then those sales may be excluded. *See* SAA at 832 ("As under current practice, the cost test generally will be performed on no wider than a model-specific basis."). In accordance with its usual practice, Commerce carried out its below-cost test here on a model-specific basis. However, due to the "unique nature of the products under investigation, [Commerce concluded] that each home market sale of an LNPP, addition, or component constitutes a distinct model for purposes of performing the cost test," and calculated an individual normal value for each sale. Preliminary Det. Concurrence Mem. at 10. "Therefore, where that single sale was made at less than the cost of production, the 'substantial quantities' requirement [was] necessarily met because that single below-cost sale represent[ed] 100 percent of the volume of sales considered in the determination of normal value." Commerce Brief at 67.

MHI and TKS contend that Commerce's actions were inconsistent with the statute. "ITA disregarded the 'substantial quantities' requirement of the Act by treating each sale as its own model, then applying the 'substantial quantities' test on a model-specific basis." MHI Brief at 36–37. Commerce's approach was "contrary to the Act because it resulted in the *automatic* exclusion of below-cost sales." *Id.* at 37.

TKS argues that Commerce's actions were inconsistent with the statutory requirement that "[i]f prices which are below the per unit cost of production at the time of sale are above the weighted average unit cost of production for the period of investigation * * * such prices shall be considered to provide for recovery of costs within a reasonable period of time." 19 U.S.C. § 1677b(b)(2)(D). TKS argues that Commerce's method presumed that for any below-cost LNPP sale, cost recovery would not occur, presumably because, by definition, there could never be more than one sale of the same model. TKS Brief at 15. In effect, TKS argues, ITA's model-specific methodology for the cost test resulted in the automatic exclusion of below-cost sales in every instance. "Thus, the methodology, in effect, nullified the substantial quantities and cost recovery criteria of section [1677b(b)(1)]." *Id.* at 16.

The Court agrees with Commerce that the model-specific cost test represents a permissible application of the statute. Use of the model-specific cost test is part of Commerce's usual practice. Furthermore, it was sanctioned in the SAA. *See supra*, pg. 44.

The use of the model-specific cost test in this case is consistent with both the statute and Congressional intent as expressed in the legislative history of the below-cost sales provision.

> These standards would not require the disregarding of below-cost sales in every instance, for under normal business practice * * * it is frequently necessary to sell obsolete or end-of-model year merchandise at less than cost. Similarly, certain products, such as commercial aircraft, typically require large research and development costs which could not reasonably be recovered in the first year or two of sales. Thus, infrequent sales at less than cost, or sales at prices which will permit recovery of all costs based upon anticipated sales volume over a reasonable period of time would not be disregarded.

S. Rep. No. 1298, 93d Cong., 2d Sess, 173 (1974) *reprinted in* U.S.C.C.A.N. 1974 at 7310–7311.

LNPPs are custom-made to order. For that reason, obsolete or end-of-model year merchandise sales would be unlikely to occur. Furthermore, the merchandise at issue here is not similar to other large-ticket items such as commercial aircraft. Unlike commercial aircraft, for example, LNPPs are sold in limited numbers and built individually to the buyer's specifications. For these reasons, Commerce's determination that a producer would be unable to recover costs based upon future sales volume, was reasonable.

Case law also supports Commerce's actions here. In previous cases, this court has endorsed Commerce's discretion to tailor the provisions of 1677b(b)(1) to particular circumstances and classes of merchandise. For example, in *INA Walzlager Schaeffler KG v. United States*, 915 F. Supp. 420 (CIT 1996), *aff'd* No. 96–1256, 96–1266 (Fed. Cir. Feb. 24, 1997), the court upheld Commerce's decision to make an exception to its usual "extended period of time" definition. The statute governing that case said that below-cost sales should be excluded if they had been made over an extended period of time. 19 U.S.C. § 1677b(b)(1)(1988).[13] Commerce's usual practice had been to define an extended period of time as consisting of three months. *Ina Walzlager*, 915 F. Supp. at 423. However in *Ina Walzlager*, Commerce had made an exception because certain models were sold in less than three months during the period of review. *Id.* Commerce explained as follows:

> Occasionally, sales occur in less than three months of an investigation or review. This is not an expected normal pattern, but an exception from the pattern of sales for which the three month guideline was developed. If three months were defined as the extended period of time when such a pattern occurred, sales below cost would never be disregarded. This result does not reflect Congressional intent, unless the goods were obsolete or end of model year.

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[13] The law has since changed. The statute now requires that below-cost sales have been made *within* an extended period of time. "By providing that below-cost sales need occur only *within* (rather than *over*) an extended period of time, Commerce no longer must find that below-cost sales occurred in a minimum number of months before excluding such sales from its analysis." SAA at 832.

Id. at 424 n.2. The court agreed with Commerce, that "Commerce's interpretation of 'extended period of time,' in this particular proceeding, constituted a reasonable exercise of discretion in determining when to disregard below-cost sales * * *." *Id.* at 424. Similarly, the Court finds that model-specific cost test used in this case was a permissible application of the statute.

The Court also finds that Commerce's determination that each sale represented a separate model was supported by substantial evidence on the agency record. *See* Memo Re: Determining the Appropriate Basis for Normal Value, Nov. 9, 1995 (N-P Doc. 73) at 3. ("Many factors underlie the particular market situation in this investigation. Most important among these are: (1) the unique demand pattern prevalent in each national market; (2) the unique technical specifications required *for each highly customized product sold*; and (3) the very low volume of individual LNPP sales in the normal business cycle.") (emphasis supplied).

Therefore, the Court sustains Commerce's decision with regard to this issue.

3. *Foreign Like Product*

As a further challenge to Commerce's constructed value calculation, MHI and TKS object to different aspects of Commerce's "foreign like product" determination.

In calculating profit margins for constructed value, Commerce relied on 19 U.S.C. § 1677b(e)(2)(A), which states that CV profit is to be based upon "the actual amounts incurred and realized by the specific exporter or producer * * * in connection with the production and sale of a foreign like product * * *." Foreign like product is defined as follows:

> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i)produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16). TKS contends that the findings that led Commerce to rely on CV rather than home-market sales in calculating normal value constitute evidence that no foreign like product exists in the home market. Specifically, TKS cites Commerce's findings that the LNPP

market is characterized by "(1) [a] unique demand pattern * * * in each national market; (2) * * * unique technical specifications required for each highly customized product sold; and (3) * * * very low volume of individual LNPP sales in the normal business cycle." Mem. re: Determining the Appropriate Basis for Normal Value, Dep't Commerce, November 9, 1995, Prop. Doc. 73 at 3. In the absence of an appropriate foreign like product, TKS argues Commerce should not have relied on 19 U.S.C. § 1677b(e)(2)(A) for calculating profit and SG&A.

In the Final Determination, Commerce argued that "TKS is incorrect to suppose that because we did not find home market sales which provided practicable price-to-price matches, no foreign like product existed. The foreign like product as defined by [19 U.S.C. § 1677(16)], (*i.e.*, sales of LNPP in Japan) did exist * * *." Final Determination at 38,146. However, Commerce does not explain which of the three foreign like product definitions it relied upon in classifying LNPPs sold in the home market as foreign like product. Therefore, the Court is unable to evaluate whether or not Commerce's decision is in accordance with law and supported by substantial evidence, and must remand this issue so that Commerce may reconsider its determination. "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

Unlike TKS, MHI "does not dispute that *the* foreign like product under investigation consists of all merchandise within the scope of the proceeding." MHI Brief at 38. However, MHI argues that it sold only LNPP systems in the United States and therefore, Commerce erred in basing CV profit and SG&A on combined home-market sales of LNPP systems and LNPP components and additions. According to MHI, the statute requires that constructed value shall include profit and SG&A derived from information regarding "the production and sale of *a* foreign like product." *Id.* (quoting 19 U.S.C. § 1677b(e)(2)(A)). The term "*a* foreign like product," MHI contends,

> is defined in section [1677(16)] * * * as those products most closely resembling the products sold in the United States. By equating the term 'a foreign like product' (meaning similar products) to the term 'the foreign like product,' (meaning the entire pool of products), ITA used SG&A and profit amounts in its calculations that were unrepresentative of LNPP system sales being examined in the investigation.

Id. at 38–39.

In framing its argument, MHI has misquoted the statute. Section 1677(16) does not define the term "a foreign like product," it defines the term "foreign like product." *See* 19 U.S.C. § 1677(16). There is nothing in the statute to require Commerce to calculate profit based on subsets of merchandise within the foreign like product. Therefore, Commerce's definition of foreign like product upon remand is not restricted to MHI's reading of 19 U.S.C. § 1677(16).

4. *Sales with "Abnormally High Profits"*

MHI also argues that in calculating profit and SG&A expenses, Commerce should have excluded certain sales, characterized by MHI as having "abnormally high profits." In its final determination, Commerce explained,

> [w]e disagree with respondents that simply because certain home market sales had profits higher than those of numerous other sales, the profits are automatically abnormally high and outside the ordinary course of trade for purposes of computing CV profit. In order to determine that profits are abnormally high, there must be certain unique or unusual characteristics related to the sales in question. However, the respondents have provided no credible information other than the numerical profit amounts to support their contention that certain home market sales had abnormally high profits.

Germany Final at 38,178.

MHI argues that the SAA "made it clear, * * * that 'sales with abnormally high profits' should be considered outside the ordinary course of trade for purposes of the calculation of SG&A and profit." MHI Brief at 37 (citing SAA at 839–40). In fact, the SAA says that Commerce should base SG&A and profit on sales made in the ordinary course of trade, and that "* * * examples of sales that Commerce *could* consider to be outside the ordinary course of trade include sales of off-quality merchandise, sales to related parties at non-arm's length prices, and sales with abnormally high profits." SAA at 839 (emphasis added). Thus, Congress granted Commerce discretion to decide under what circumstances highly profitable sales would be considered to be outside of the ordinary course of trade. Commerce's decision to require additional evidence before excluding such sales was a reasonable exercise of that discretion.

In order for Commerce to exclude sales found to have been made *below* the cost of production, the statute requires that Commerce provide additional evidence demonstrating that such sales were actually outside the ordinary course of trade. *See* 19 U.S.C. § 1677b(b)(1). Similarly, Commerce's decision to require additional evidence demonstrating that sales with higher profits were outside of the ordinary course of trade was consistent with the statutory scheme and a reasonable construction of the provision at issue.

5. *Major Inputs from Affiliated Suppliers*

In calculating constructed value, Commerce required MHI to identify all suppliers that provided inputs accounting for at least two percent of the total cost of materials, labor and overhead of any press component, or five percent or more of the total cost of materials, labor and overhead of a complete press system. Commerce also required information about MHI's commercial relationships with the suppliers identified and detailed cost of production data for the inputs received from them.

Based on the submitted data, Commerce concluded that certain of the suppliers were "affiliated persons" with MHI as defined at 19 U.S.C.

§ 1677(33) and that these "affiliated persons" had supplied "major inputs" to MHI, pursuant to 19 U.S.C. § 1677b(f)(3). Section 1677b(f)(3) provides as follows:

> If, in the case of a transaction between affiliated persons involving the production * * * of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, * * *.

MHI argues that Commerce's threshold for identifying a "major input" here—an input having the value of at least two percent of the value of one of the five press components or five percent or more of the value of a total press system—was inconsistent with the statute and with Commerce's past practice. In previous "post-URAA proceedings," MHI argues, Commerce "has consistently defined 'major input' as an input which represents a 'significant percentage' of the *total cost* of manufacture for the subject merchandise." MHI Brief at 39–40.

Commerce disputes MHI's contention that it failed to apply its normal "significance" test. 61 Fed. Reg. at 38,162. Commerce stated,

> [i]n a typical case in which the subject merchandise only requires a few inputs, we agree that a threshold of two percent for defining a major input appears low. However, in this case, LNPPs require thousands of inputs, with no single input representing a large share of the total LNPP cost * * *. Accordingly, since the inputs we tested represent the most significant inputs used to produce the subject LNPPs, we consider it appropriate in this instance to categorize inputs meeting the two percent threshold as major inputs.

Id.

The statute does not contain a definition of a "major input." Therefore, the Court will defer to Commerce's interpretation of the term, if the interpretation is reasonable.

The special rule for major inputs was added to the antidumping law in 1988 "to address diversionary input dumping by authorizing Commerce to inquire whether the transfer between 'related' persons (*i.e.*, 'affiliated' persons under section [1677b(f)(3)]) of such an input is at a price below the input's production cost." SAA at 838 (citing H. Rep. 576, 100th Cong., 2d Sess. 595 (1988)).

Commerce found that MHI "obtained from affiliated suppliers numerous inputs representing over two percent of the total cost of a component (none of which represent more than five percent of the LNPP total production cost), the sum of which represents a significant portion of the total LNPP cost of production." Japan Final at 38,162. If Commerce had defined "major inputs" as MHI suggested, to mean inputs worth between ten and twenty percent of the subject merchandise, it would have been unable to examine any inputs supplied to MHI by related parties, *see* Commerce Brief at 76 (citing Japan Final, 61 Fed. Reg.

at 38,162), thus frustrating the Congressional intent that certain inputs supplied by related parties be scrutinized to prevent "diversionary dumping." Therefore, in this case, it was reasonable for Commerce to set the threshold for defining a major input lower than it has in past determinations.

Having appropriately decided to set the threshold at a lower level than would be typical, Commerce was obliged to choose a specific number for purposes of administration. The nature of this choice made a certain degree of randomness unavoidable. It is difficult, for example, to distinguish between two percent and three percent, or between five percent and six percent. This difficulty was exacerbated by the complexity of the subject merchandise as well as the large number of parts and suppliers involved.

In order to make its choice, Commerce was required to, "reason its way to a decision without pretending that that decision reflected some degree of rational perfection * * *." *Fishermen's Dock Co-op. Inc. v. Brown*, 75 F.3d 164, 173 (4th Cir. 1996). "Where the agency's line-drawing does not appear irrational and the [plaintiff] has not shown that the consequences of the line-drawing are in any respect dire * * * we will leave that line-drawing to the agency's discretion." *Leather Indus. v. Environmental Protection Agency*, 40 F.3d 392, 409 (D.C. Cir. 1994).

Here, Commerce quoted a letter from MHI stating that for one of the two POI sales, "'if a major input were defined as any input accounting for one percent of total purchase price * * * 90 percent of the * * * suppliers could be ignored because their sales fall below this figure.'" Japan Final, 61 Fed. Reg. at 38,162 (quoting MHI August 24, 1995 Submission, N-P doc. 8 at 3). Furthermore, the record demonstrates that of MHI's many suppliers, few were required to provide cost data. *See* Response of Mitsubishi Heavy Industries, Ltd. to Antidumping Section A Qr: Questions Relating to Affiliated Parties, Costs and Documentation, N-P doc. 105, Exs. 7 and 8. Based on the evidence before it, Commerce's decision to set the threshold at two percent of an LNPP component or five percent of an LNPP system was a permissible exercise of its discretion. The thresholds set by Commerce represent a reasonable attempt to comply with the requirement that the inputs at issue be "major inputs"—and to ensure that respondent is not excessively burdened—while at the same time addressing the potential for price manipulation presented by affiliated party transactions.

MHI also argues that Commerce "failed to articulate a basis for its finding that certain companies were affiliated with MHI." MHI Brief at 42. The statute defines "affiliated persons" as follows:

> (A) Members of a family, including brothers and sisters * * *.
> (B) Any officer or director of an organization and such organization.
> (C) Partners.
> (D) Employer and employee.

> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> (G) Any person who controls any other person and such other person.

19 U.S.C. § 1677(33).

Commerce argues that "determination of affiliation may be based on a close supplier relationship," Japan Final at 38,163, citing 19 U.S.C. § 1677(33)(G), which defines affiliated persons to include "any person who controls any other person and such other person." Commerce's interpretation is supported by the SAA.

> The traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm "operationally in a position to exercise restraint or direction" over another even in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.

SAA at 838.

However, it is not clear to the Court on what basis Commerce determined that the suppliers at issue here were affiliated with MHI. Commerce requested that MHI list inputs obtained from suppliers that furnished more than 50 percent of their total annual sales to MHI, but stated that "we never indicated that this constitutes affiliation." Japan Final at 38,163. At oral argument, Commerce agreed with MHI that it had failed to explain why it treated certain parties as affiliated and requested that the Court remand this issue so that it might provide an explanation of its standard.

"The agency must articulate a 'rational connection between the facts found and the choice made.'" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)(quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Here, as it acknowledged, Commerce failed to state the basis upon which it determined that the suppliers identified by MHI were affiliated. Therefore the Court remands this issue so that Commerce may reevaluate its determination.

Goss objects to Commerce's failure to treat a trading company ("Trading Company")[14] involved in MHI's sale to Piedmont Publishing Company as an affiliated party with MHI. Goss Brief at 11–12.

The statute defines "affiliated persons" to include "[t]wo or more persons directly or indirectly controlling, controlled by, or under common

[14] The name of the trading company is proprietary information.

control with, any person." 19 U.S.C. § 1677(33)(F). MLP is a joint venture between MHI and Trading Company. Goss argues that MHI and Trading Company control a third person, MLP, and that therefore, MHI and Trading Company must be treated as affiliated persons. Goss Brief at 12.

In response, Commerce states that "[t]he MLP joint venture between MHI and the trading company does not in and of itself constitute control between MHI and the trading company." Japan Final at 38,157. Furthermore, Commerce argues, information provided by MHI did not support "the pre-condition for affiliation [for purposes of subsections (F) and (G) of 19 U.S.C. § 1677(33)]: that MHI was 'legally or operationally in a position to exercise restraint or direction over' Trading Company." Commerce Brief at 83 (citing 19 U.S.C. § 1677(33)).

Commerce's actions here were not consistent with the statute. The statutory definition of affiliated parties at 19 U.S.C. § 1677(33)(F) does not require that MHI and Trading Company exercise control over each other. The statute requires only that "two or more persons," control a third person. *Id.*

Commerce's determination is based on a misreading of the statute. Therefore, the Court is remanding for Commerce to reevaluate its determination as to whether MHI and Trading Company are affiliated.

IV. The Exclusion of TKS's Four-High Tower Unit Sale to the Dallas Morning News

TKS objects to Commerce's refusal to exclude its sale of a certain press addition to the Dallas Morning News ("DMN"), describing the sale as "highly unusual." According to TKS, "ITA maintains discretion to exclude a U.S. sale in calculating the margin in an antidumping investigation." TKS Brief at 40 (citing *Ipsco Inc. v. United States*. 13 CIT 402, 408, 714 F. Supp. 1211, 1217 (1989) *rev'd on other grounds*, 965 F.2d 1056 (Fed. Cir. 1992)).[15] In this case, TKS argues, "ITA's failure to exclude the aberrational * * * DMN sale violates the law's 'fair comparison' requirement, because its inclusion unfairly inflates the duty deposit rate by a large percentage, while its exclusion would not impede ITA's margin calculation in any way." TKS Brief at 41.

Commerce's decision not to exclude the DMN sale was consistent with both the statute and relevant case law. "As the court has made quite clear, regular exclusion of sales not in the ordinary course of trade *only* occurs on the home-market-sales side of the price comparison." *American Permac, Inc. v. United States*, 16 CIT 41, 42, 783 F. Supp. 1421, 1423 (1992) (emphasis supplied). The reason for this is that according to the

[15] In fact, the passages TKS quotes in support of its assertion that Commerce has the discretion to exclude aberrational sales from the calculation of U.S. price were merely dicta. The court has not yet determined whether "Commerce has discretion under the statute to exclude nonrepresentative sales from United States price and what the contours of that discretion should be." *Böwe Passat Reinigungs-Und Wäschereitechnik Gmbh v. United States*, 20 CIT ___, 926 F. Supp. 1138, 1149 (1996). The Court need not decide that question here. "That issue will arise when Commerce's decision to exclude a nonrepresentative sale is challenged before the court and the court is called upon to decide whether such an application of the statute constitutes a permissible construction." *Id.* Resolution of this case requires only that the Court decide whether Commerce's decision to include TKS's DMN sale was a permissible interpretation of the statute.

statute, the normal value of the subject merchandise is the price "at which the foreign like product is first sold * * * in the exporting country, in the usual commercial quantities and in the ordinary course of trade * * *." The definition of export price, however, does not include an "ordinary course of trade" provision.[16] *See IPSCO, Inc. v. United States*, 12 CIT 384, 394, 687 F. Supp. 633, 640–41 (1988) ("Congress has provided for numerous adjustments, allowances and exclusions on each side of the fair value equation in order to insure the fairest possible comparison between markets * * *. In light of this detailed framework, the court may assume that if Congress intended to require the administering authority to exclude all sales made outside the 'ordinary course of trade' from its determination of United States price it could have provided for such an exclusion * * *. It has not done so.") At the same time, the *American Permac* court explained, "[i]t does not follow inexorably, however, that every U.S. sale of the merchandise under investigation must be included in every case * * *. The distinction is that while U.S. sales outside the ordinary course of trade ordinarily should be included (this may be the very cause of injury), a methodology is to be applied which accounts for sales which are unrepresentative and which do not lead to a fair price comparison." 16 CIT at 42, 783 F. Supp. at 1423.

Commerce distinguished the sale at issue here from sales it chose to exclude in other cases. Commerce explained that although in the past it has excluded some U.S. sales, specifically, sample sales, trial sales, and sales of damaged merchandise, "[i]n those cases, the transactions involved stood by themselves; that is, they were of commodity products which were not directly related to other sales. For example, * * * a printer would never be bound to a paper supplier just because it tried a free roll of normal quality paper * * *." Japan Final at 38,151.

On the other hand, Commerce noted, "[s]ales of LNPP, * * * are of expensive, customized capital equipment which actually change the nature of the printer's operations. * * * [I]n light of the duration of relations between TKS and the DMN, one can reasonably interpret this sale as part of an over-arching marketing strategy vis-a-vis a long-term business relationship with the DMN, i.e., as a loss leader sale." *Id.*

Moreover, Commerce explained, "[t]he Department's discretion to exclude sales must take into account the fact that there is such a small pool of sales which are available for analysis. Because the Department is not convinced that the DMN sale in question was so unusual that it should be disregarded, we are including this sale in our final analysis, * * *." *Id.*

Commerce's decision to include the DMN sale was consistent with the statute and case law, as well as Commerce's own practice in past investigations. It was also reasonable, in light of the small pool of sales available for analysis. Therefore, the Court will sustain Commerce's determination on this issue.

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[16] *American Permac* was decided under the pre-URAA version of the antidumping statute. However, this aspect of the statute was not changed by the URAA.

CONCLUSION

For the reasons stated above, Commerce's final determination in *Large Newspaper Printing Presses from Japan*, 61 Fed. Reg. 38,139 (Dep't Commerce 1996)(final det.) is remanded for Commerce to correct its error in allocating respondents' indirect selling costs incurred in Japan, explain its decision to adjust normal value for imputed credit expenses, reconsider its decision to treat LNPPs sold in the home market as foreign like product, reevaluate its decision to treat certain of MHI's suppliers as affiliated parties and reconsider its decision not to treat Trading Company and MHI as affiliated parties. Commerce's determination is sustained in all other respects.

PUBLIC VERSION

(Slip Op. 98–83)

KOENIG & BAUER-ALBERT AG, ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND GOSS GRAPHICS, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 96–10–02298

[Final determination of sales at less than fair value sustained in part and remanded in part]

(Decided June 23, 1998)

Shearman & Sterling, (Thomas B. Wilner, Jeffrey M. Winton, Michael J. Chapman) for Plaintiffs MAN Roland Druckmaschinen AG and MAN Roland Inc.; *Kirkland & Ellis, (Kenneth G. Weigel, Carol A. Rafferty, Nancy Kao)* for Plaintiffs Koenig & Bauer-Albert AG and KBA-Motter Corp.

Frank W. Hunger, Assistant Attorney General of the United States, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Of Counsel, *Boguslawa B. Thoemmes*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, and *Randi-Sue Rimerman*, Attorney, Department of Justice, Civil Division, Commercial Litigation Branch, for Defendants.

Wiley, Rein & Fielding, (Charles Owen Verrill, Jr., Alan H. Price, and *Willis S. Martyn III)* for Defendant-Intervenors.

OPINION

POGUE, *Judge:* Plaintiffs Koenig & Bauer-Albert AG ("KBA") and MAN Roland Druckmaschinen AG and MAN Roland Inc. ("MAN Roland"), respondents in the underlying investigation, and Plaintiff Goss Graphic Systems, Inc. ("Goss"), petitioner in the underlying investigation, filed separate motions challenging various aspects of the determination of the International Trade Administration of the United States Department of Commerce ("Commerce" or "ITA") regarding imports of large newspaper printing presses ("LNPP") from Germany. *Large Newspaper Printing Presses and Components Thereof, Whether*

Assembled or Unassembled, from Germany, 61 Fed. Reg. 38,166 (Dep't Commerce 1996) (final det.)("Germany Final"). The motions were consolidated.

The antidumping investigation of LNPPs from Germany was conducted simultaneously with Commerce's investigation of sales of LNPPs from Japan. Issues common to both investigations were discussed in Germany Final. The Court affirmed Commerce's determinations with respect to common issues of scope and standing. *Mitsubishi Heavy Indus. v. United States*, 986 F. Supp. 1428 (1997). Familiarity with the Court's opinion on scope and standing issues is presumed.

MAN Roland challenges Commerce's refusal to accept amendments to the contract prices of two presses; Commerce's circumstance of sale adjustment for imputed credit expenses; Commerce's allocation of indirect selling expenses incurred by MAN Roland's U.S. subsidiary, MRU; Commerce's decision to rely on facts available in lieu of cost data supplied by MAN Roland; Commerce's choice of facts available; Commerce's choice of a variance to adjust MAN Roland's estimated overhead expenses to approximate actual expenses; Commerce's refusal to average MAN Roland's costs with those of MAN Roland's wholly owned subsidiary; Commerce's decision to include home-market sales with "abnormally high profits" in its profit calculation for constructed value; Commerce's treatment of certain U.S. sales as constructed export price ("CEP") sales; and Commerce's decision to treat MAN Roland's installation costs as further manufacturing costs. *See* Mem. Pls. MAN Roland Druckmaschinen AG and MAN Roland Inc. Support Mot. J. Agency Record Company- and Country-Specific Issues at 3–4 ("MAN Roland brief").

Goss challenges four aspects of Commerce's final determination. Two of Goss's objections, regarding Commerce's decision to deduct imputed interest from normal value and Commerce's allocation of indirect selling expenses incurred in Germany and Japan, are common to both the German and the Japan investigations. These are discussed in *Mitsubishi Heavy Indus. v. United States*, slip op. 98–82, (CIT June 23, 1998).

With regard to the Germany investigation, Goss objects to Commerce's allocation of costs for two of MAN Roland's U.S. sales, and Commerce's inclusion of Canadian warranty expenses in estimating MAN Roland's U.S. warranty expenses. Brief Support Goss Graphic Sys., Inc. Rule 56.2 Mot. J. Agency Record Comp./Country Specific Issues ("Goss brief").

KBA challenges Commerce's choice of facts available in calculating its dumping margin. *See* Brief of Pls. Koenig & Bauer-Albert AG and KBA-Motter Corp. Support Mot. J. Agency Record (KBA brief).

DISCUSSION

I. MAN ROLAND'S PRICE AMENDMENTS

Commerce calculated MAN Roland's dumping margin based on sales of two complete Geoman presses[1], to *The Rochester Chronicle and Democrat* ("Rochester") and *The Times Leader* of Wilkes Barre ("Wilkes Barre") and two sales of German components for U.S.-made presses or additions. A fifth sale, of parts and subcomponents, was excluded from Commerce's final analysis because Commerce determined that it was outside the scope of its investigation. *See* Germany Final at 38,172.

Several months after Goss filed its antidumping petition, MAN Roland amended its contracts for the Rochester and Wilkes-Barre presses. In the final determination, Commerce refused to accept the price adjustments and calculated U.S. price based on the original contract prices of the two sales. MAN Roland challenges this decision.

According to the statute, United States price is to be based on "the price at which the subject merchandise is first sold (or agreed to be sold)" to an unaffiliated purchaser in the United States. 19 U.S.C. § 1677a(a), (b) (1994). The statute does not discuss the treatment of price amendments made after the period of investigation. Therefore, the Court must defer to Commerce's interpretation of the statute if that interpretation is reasonable. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("If, * * * the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, * * *. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnotes omitted); *see also Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) ("[A] court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another.").

MAN Roland argues that Commerce's refusal to accept the price amendments was inappropriate because "[t]here was no evidence in this case that the prices were being manipulated to avoid a dumping finding." MAN Roland brief at 5. However, MAN Roland's implicit statement of the relevant legal standard is inaccurate. Commerce was not looking for evidence of manipulation. Commerce's rejection of the price amendments was based upon the *potential* for manipulation, not evidence of actual manipulation.

> In past cases, the Department [Commerce] has stated that its standard practice is not to accept price adjustments instituted after the filing of a petition * * *. [W]e have held that we are cautious in accepting price increases * * * so as to discourage potential manipulation of potential dumping margins, and have determined the

[1] Geoman is the name of one of the LNPP models produced by MAN Roland.

> original contract price which pre-dated the filing of the petition as the proper basis for U.S. price.

Germany Final at 38,181.

Commerce's decision to reject price amendments that present the potential for price manipulation was a permissible interpretation of the statute. *See Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1046, 700 F. Supp. 538, 555 (1988) ("The ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has a certain amount of discretion [to act] * * * with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law."), *aff'd* 8 Fed. Cir. (T) 45, 898 F.2d 1577 (1990); *see also Dastech Int'l, Inc. v. ITC*, 21 CIT ____, 963 F. Supp. 1220, 1229 (1997) ("Post-petition pricing changes may be suspect because of the possibility of posturing to promote the outcome a party desires.").

Commerce's decision also was supported by substantial evidence. The price amendments themselves, made after the initiation of the investigation, constitute evidence that manipulation may occur, as does the fact that Commerce was unable to verify the amendments. *See* Def.'s Mem. Opp. Mot. MAN Roland Druckmaschinen AG and MAN Roland Inc. J. Agency Record Country and Company-Specific Issues at 7–8 ("Commerce brief") ("ITA could not conclude that MRD's amendment was *bona fide*, where the amendment pertained to a contract in connection with an unfinished press, the payment of which would not occur (and, thus, could not be verified) until after the investigation had ended.").

MAN Roland also argues that because "there was no factual basis for concluding that the price amendments at issue * * * were in any way fictitious or manipulated * * * the Department's determination can only be sustained if there is, in fact, a *per se* rule requiring the Department to automatically disregard any prices negotiated after the petition was filed." MAN Roland brief at 7. MAN Roland concludes that Commerce does not operate under such a rule and therefore, Commerce erred in excluding the post-petition price amendments.[2]

MAN Roland is mistaken. The Court need not find that Commerce has a per se rule in order to uphold its decision. As explained above, Commerce's rejection of MAN Roland's price amendments was in accordance with law and supported by substantial evidence. Therefore, the

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[2] As evidence that Commerce has no "*per se* rule" regarding price amendments, MAN Roland cites Commerce's regulation that any sales that occur during the month in which a petition is filed will normally be included in Commerce's investigation. 19 C.F.R. § 353.42(b)(1). Thus, MAN Roland argues, "in every case in which the petition is filed before the end of the month, the Department routinely considers sales that were negotiated after the citation was filed." MAN Roland brief at 7. Similarly, MAN Roland argues, Commerce routinely uses post-petition prices when carrying out administrative reviews of antidumping duty orders.

The Court is not persuaded by either of MAN Roland's examples. The Commerce regulation involves sales made during a limited period of time, between the date a petition is filed and the end of the month in which that petition is filed. This case involves a price amendment made several months after the end of the period of investigation. MAN Roland's administrative review reference is equally inapposite because the purpose of an administrative review is different from that of an antidumping investigation. The purpose of an investigation is to determine whether dumping has occurred in the past and to calculate an estimated margin to be deposited on future entries. The purpose of the administrative review is to assess actual dumping duties, giving the parties, annually, an opportunity to adjust prices so that unfair pricing, and dumping duties, can be avoided. *See* 19 U.S.C. § 1675 (1994).

Court will not disturb Commerce's decision. *See* 19 U.S.C. § 1516a(b)(1) ("The court shall hold unlawful any determination, * * * found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *.").

II. Imputed Interest Expense

In calculating both normal value and U.S. price, Commerce made a circumstance-of-sale adjustment for imputed interest expenses incurred during production of the subject merchandise. Commerce's usual imputed interest calculation is based only on the cost of financing receivables between shipment date and payment date. *See* Germany Final at 38,187.

MAN Roland contends that Commerce should have treated imputed interest expense incurred prior to shipment as a cost of production. Commerce chose to treat the imputed interest as a circumstance of sale, MAN Roland argues, only because the statute would not permit Commerce to deduct imputed interest from the cost of production. "[U]nder both German and U.S. accounting principles, capitalized interest could not have been included in the cost of MAN Roland's LNPPs. And, because the statute incorporates those accounting principles, capitalized interest could not have been included in the constructed value * * *." MAN Roland brief at 10–11. Commerce does not dispute MAN Roland's assertion that German generally accepted accounting principles ("GAAP") would not allow imputed interest to be included in cost of production. Furthermore, in some instances, Commerce is required to calculate costs "based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country * * * and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). However, that requirement does not apply to the circumstance of sale provision. *See id.* Thus, the issue here is whether Commerce had the discretion to treat the imputed interest expense as a circumstance of sale rather than part of the cost of production.

The statute requires that constructed value be "increased or decreased by the amount of any difference * * * between the [U.S. price] and [constructed value] * * * that is established to the satisfaction of the administering authority to be wholly or partly due to * * * differences in circumstances of sale." 19 U.S.C. § 1677b(a)(6)(C). The statute does not define the term circumstance of sale. Thus, Commerce has broad discretion in determining what constitutes a circumstance of sale. *See Sawhill Tubular Div. Cyclops Corp. v. United States*, 11 CIT 491, 497, 666 F. Supp. 1550, 1555 (1987) ("It is * * * clear that Congress had deferred to the expertise of the agency and vested broad discretion in it to make adjustments for the differences in the circumstances of sale."). That discretion, however, is limited. "One recognized limitation upon this power is that adjustment be made for those factors and conditions which have a direct bearing on or relationship to the sales under consideration." *Id.*

In the final determination, Commerce explained,

> We believe that it is appropriate in this instance to recognize the comprehensive financing arrangement for each sale as a circumstance of sale adjustment. LNPPs require substantial capital expenditures over an extended time period because of their size and lengthy production process * * *. Moreover, the projects generally call for the purchaser to provide scheduled progress payments before completion of a project. Our normal imputed credit calculation * * * does not measure the effect of progress payments made relative to production costs incurred. To adjust sales prices for the effect of the respondent incurring significant capital outlays at the beginning of a project * * * or receiving large sums of money up front * * * we calculated imputed credit for each home market and U.S. sale * * *.

61 Fed. Reg. at 38,187. Commerce calculated imputed interest by subtracting progress payments from capital outlays made during the construction period and then multiplying the balance by the applicable interest rate. *See* Mem. Re: Constructed Value, Further Manufacturing and Constructed Export Price Adjustments for Final Determination, N-P Doc. 107 at 4. Commerce's treatment of the imputed interest as a circumstance of sale allowed it to fully recognize the complexity of the financing arrangements at issue here. Given that construction on a single sale in this case may take several years to complete, as well as the fact that financing arrangements may vary widely from sale to sale, the Court finds Commerce's decision to treat the imputed interest expenses as a circumstance of sale was reasonable.

MAN Roland argues that Commerce's actions here were inconsistent with its actions in *Zenith Elec. Corp. v. United States*, 18 CIT 870 (1994). In *Zenith*, Commerce made a circumstance of sale adjustment for respondent's imputed credit expense. However, Commerce refused to offset the imputed credit expense—based on "the average duration of accounts receivable,"—by "the average duration of accounts payable." *Id.* at 875. Commerce explained,

> by allowing the customer a period of time to pay, the seller effectively reduces the sales price of the merchandise because of the time value of money * * *. To the extent that a manufacturer can delay paying its suppliers, the cost of materials is reduced by the time value of money, resulting in a saving in the cost of production. Since accounts payable are, thus, production costs, they cannot result in a circumstance-of-sale adjustment.

Id. at 875, n.8. Commerce explained further, that it could not treat accounts payable as a circumstance of sale adjustment because doing so "would require us to adjust for factors relating to cost of production, which are unrelated to the *sales* at issue." *Id.* In this case, unlike *Zenith*, Commerce made the imputed interest adjustment to compensate for different payment schedules by customers to respondent. Thus, the adjustment was related directly to the sales at issue and appropriately treated as a circumstance of sale.

III. Allocation of Indirect Selling Expenses

In calculating United States indirect selling expenses for MAN Roland's affiliated agent in the United States, MRU, Commerce divided total United States indirect selling expenses incurred on sales of LNPPs during the period of investigation, by the value of United States sales realized—i.e., shipped and invoiced—during the same period. This rate was applied to the subject sales (sales made but not necessarily realized during the period of investigation)[3] to compute the indirect selling expenses attributable to each such sale.

MAN Roland argues that Commerce's methodology overstated MAN Roland's indirect selling expenses. Just prior to the period of investigation, MAN Roland explains, the LNPP industry experienced a period of depressed sales. Because MAN Roland had a below-average number of sales made just *before* the period of investigation, it had a below-average number of sales realized *during* the period of investigation. MAN Roland brief at 15. MAN Roland's period of sales depression ended at the end of 1993, so that during the period of investigation, which lasted from July 1993 to June 1995, MAN Roland's sales made returned to normal levels. *Id.*

> The great difference between the value of the orders [sales made] MAN Roland received during the period and the value of the shipments [sales realized] * * * during the same period resulted in a serious distortion in the Department's calculation of the indirect selling expense adjustment. In simple terms, the Department took the indirect selling expenses incurred by MRU during the two-year period and divided them by the very low level of *shipments* during the period to calculate a very high indirect selling expense rate. It then applied this high expense rate to the high level of sales *ordered* during the period.

Id. at 15–16.

MAN Roland contends that in calculating the indirect selling expense rate, Commerce should have divided total indirect selling expenses by the value of sales made during the period of investigation, rather than by the value of sales realized. "As a matter of simple arithmetic, the denominator used to calculate an expense rate must be determined on the same basis as the figures to which the rate will be applied." *Id.* at 16.

The statute requires that Commerce deduct from CEP all selling expenses, including indirect selling expenses, defined as "any selling expenses" not deducted as commissions, direct selling expenses, or selling expenses that the seller pays upon behalf of the purchaser. 19 U.S.C. § 1677a(d)(1)(D). According to the Statement of Administrative Action to the URAA, indirect selling expenses are expenses that "would be incurred by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at least in part) to such

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[3] Commerce bases the date of sale on the date when all the essential terms (*i.e.*, price and quantity) are firmly established and no longer within the control of the parties to alter without penalty. *See* Germany Final at 38,182. Because of the length of the production process for LNPPs, an LNPP sold during the period of investigation might not be shipped until several years later.

sales." H.R. Doc. No. 103–316 at 824 (1994) ("SAA").[4] Neither the statute nor the SAA explains how indirect selling expenses are to be allocated. Therefore, the Court must accept Commerce's methodology if that methodology is reasonable.

In order to calculate an allocation ratio for indirect selling expenses, Commerce needed to divide MAN Roland's total indirect selling expenses for the period of investigation, by the total value of the sales for which those expenses were incurred. However, indirect selling expenses cannot be tied to specific sales, so Commerce had to choose an appropriate pool of sales to serve as a denominator. Commerce normally calculates the indirect selling expense ratio by dividing indirect selling expenses by the sales revenue realized during the period of investigation. Preliminary Det. Concurrence Mem., N-P Doc. 70 at 10–12 ("Concurrence Mem."). The decision to do so here was within Commerce's discretion and in accordance with law. Sales revenue realized represents a verifiable pool of sales for which expenses have actually been incurred.

MAN Roland also argues that Commerce's allocation methodology was inconsistent with *Sweaters from Taiwan*, 55 Fed. Reg. 34,585, 34,596 (Dep't Commerce 1990)(final det.). In that case, Commerce declined to allocate indirect selling expenses over sales realized and instead allocated them over purchase orders received (sales made). However, in *Sweaters from Taiwan*, Commerce found a correlation between the indirect expenses incurred during the period of investigation and the sales ordered during the investigation. *See id.* at 34,596 ("The Department has determined that it is most appropriate to allocate selling expenses over the value of sales for which such expenses were incurred."); *see also* Concurrence Mem. at 12 ("In *Sweaters from Taiwan*, there was a close correlation between POI sales orders and POI selling expenses.").

In this case, MAN Roland has provided no evidence to indicate that a correlation exists between the sales ordered during the period of investigation and the indirect selling expenses incurred during that period. Furthermore, Commerce found that for LNPPs, "sales efforts last for years and yield only large sales at irregular intervals * * *." Germany Final at 38,183; *see also* Concurrence Mem. at 12 ("In the LNPP industry due to the significant lead time involved among the different phases of the sales process (*i.e.*, sales negotiation, sales contract, production, shipment and the receipt of sales revenue for accounting purposes), such correlation does not exist.").

For the above reasons, the Court finds, Commerce's allocation of MRU's indirect selling expenses was consistent with its previous deter-

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[4] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *." H.R. Doc. No. 103–316 at 656 (1994). "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.* (quoted in *Delverde, SrL v. United States*, 21 CIT ____, 989 F. Supp. 218, 230 n.18 (1997)). *See also* 19 U.S.C. § 3512(d) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

minations, supported by substantial evidence, and in accordance with law.

IV. CONSTRUCTED VALUE ISSUES FOR MAN ROLAND

1. *Commerce's Rejection of MAN Roland's Submitted Cost Data*

In calculating normal value for the subject sales, Commerce relied on constructed value, pursuant to 19 U.S.C. § 1677b(4). During the investigation, MAN Roland requested that, for purposes of the preliminary determination, Commerce accept projected costs of production for the Wilkes-Barre and Rochester presses because they were still in the production process, and actual costs were not yet available. Commerce normally accepts only actual costs of producing subject merchandise. Germany Final at 38,186.

The cost accounting system used by MAN Roland to generate cost projections for the two presses, the ADK system, was described by MAN Roland as follows:

> [t]o produce a press, MAN Roland must produce a project-specific bill of materials that specifies the materials to be used in the production and provides detailed work instructions for the workers involved in the production. MAN Roland has a "project specific standard costing system" (the "ADK" system) which can calculate costs precisely based on those detailed work instructions. The ADK system calculates standard costs based on the project-specific bill of materials by (1) valuing materials based on actual prices for the materials and (2) valuing labor by multiplying the standard labor time for each production operation by the actual wage rate of the worker responsible for performing the operation.

MAN Roland brief at 21–22.

In its decision to include the two U.S. sales, despite the fact that they would not be completed by the date of the preliminary determination, Commerce "relied on MAN Roland's representations that project-specific standard costs * * * would be available for use in the preliminary determination, and that we would be able to compare these costs against substantial actual costs at verification and adjust them accordingly." Sales Exclusion Mem., N-P Doc. 68 at 4.

In the final determination, Commerce rejected MAN Roland's projected costs and relied on information available to calculate CV for the incomplete presses.

MAN Roland objects to Commerce's rejection of its submitted CV information. MAN Roland argues that "[a]t bottom, the Department decided to reject the costs generated [by MAN Roland's standard costing system] because those costs were not verified. But the fault in that regard was not MAN Roland's. Those costs were accurate and fully verifiable." MAN Roland Brief at 23. MAN Roland suggests two methods by which Commerce could have verified the costs generated by its cost accounting system. "[T]he Department could have compared the actual costs and the [projected] costs for similar presses produced for the home market * * *. Alternatively, the Department could have compared 'the

reported costs to the actual costs for the completed elements of the presses at verification.'" *Id.* at 25 (citing Feb. 23 Mem. from team to Richard Moreland re: sales exclusion issues at 4, N-P Doc. 68). However, MAN Roland contends, "[t]he Department's verifier simply refused to examine this information. Apparently believing (incorrectly) that the [projected] costs were subject to manipulation because they had been generated after the initiation of the case, she refused to look further." *Id.* at 26.

"Congress has afforded ITA a degree of latitude in implementing its verification procedures." *Floral Trade Council v. United States*, 17 CIT 392, 399, 822 F. Supp. 766, 772 (1993). "The decision to select a particular method of verification rests solely within the agency's sound discretion * * *. If a reasonable standard is applied and the verification is supported by substantial evidence, the court will sustain the methodology." *Id.* (citing *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987)).

In this case, Commerce verifiers conducted a physical inspection of MAN Roland's production plant and reviewed source documents to verify MAN Roland's questionnaire responses for numerous elements necessary to calculate constructed value. *See* Mem. Re: Verification of Constructed value ("CV") and Further Manufacturing ("FM") Data, May 16, 1996, N-P Doc. 95 ("Cost Verification Report"). The documents examined by Commerce included MAN Roland's work-in-process ("WIP") inventory, where MAN Roland records production costs during the manufacturing phase; MAN Roland's work orders for individual presses; and MAN Roland's audited financial statements, which Commerce reconciled with the WIP inventory. *Id.*

Based on the description above, excerpted from Commerce's verification memorandum, the Court finds, Commerce's verification procedures were reasonable and adequate and therefore, in accordance with law. *See Floral Trade Council*, 17 CIT at 399, 822 F. Supp. at 772 (finding Commerce's verification to be adequate where Commerce "conduct[ed] a physical inspection of [respondent's] production areas, and [reviewed] source documents * * *.").

Furthermore, Commerce's decision to reject MAN Roland's projected costs was supported by substantial evidence. At verification, Commerce discovered that although MAN Roland prepares a project-specific bill of materials for each LNPP,

> in the normal course of business, MRD does not prepare project-specific standard workplans [i.e., apply the ADK system] for each LNPP that it manufactures. According to company officials, the detailed, project-specific workplans are only prepared for new press models or for presses with unique or special features. MRD officials also indicated that the workplans for the Rochester and Wilkes-Barre projects had been prepared * * * solely for the purpose of providing CV information in this case.

CV Verification Report at 2. The fact that these costs were generated specifically for purposes of the investigation supports Commerce's con-

clusion that the submitted costs were not independently reliable. *See* SAA at 834–35 ("In determining whether a company's records reasonably reflect costs, * * * Commerce * * * will consider whether the producer historically used its submitted cost allocation methods to compute the cost of the subject merchandise prior to the investigation * * * and in the normal course of its business operation."). In addition, Commerce's verifier found that MAN Roland does not reconcile actual costs recorded in its WIP inventory, to the estimated costs in its project-specific workplan.

> Thus, company officials could not identify for us those parts of the Rochester and Wilkes-Barre presses that had been completed as of December 31, 1995 (and for which actual cost data could be reported) and those that remained unfinished as of that date (and would therefore require costs to be reported based on the project-specific standard workplan) * * *. Although MRD reported that the Rochester and Wilkes-Barre sales were 60 and 81 percent complete, respectively, * * * these figures were based on a comparison of project costs recorded in the company's WIP inventory account to total standard workplans. Thus, * * * MRD did not report actual costs incurred to date for the specific projects. Rather, the reported COP and CV figures for these projects were based solely on costs from the company's standard work plans, * * *.

Cost Verification Report at 2–3. Commerce's determination, that it was unable to verify MAN Roland's submitted cost data was in accordance with law and supported by substantial evidence. Therefore, the Court finds, Commerce's decision to rely on information available was appropriate. *See* 19 U.S.C. § 1677e.

2. *Commerce's Choice of Facts Available*

Rather than relying upon MAN Roland's submitted costs, Commerce used, as facts available, the original estimated costs submitted by MAN Roland, adjusted for the difference, or variance, between estimated and actual costs for a single home market sale designated as HM4. N-P Doc. 107 at worksheet 4.

MAN Roland argues that Commerce's decision to adjust MAN Roland's estimated costs based on the variance of a single sale was arbitrary and impermissibly inflated MAN Roland's costs.

Commerce is authorized to use the facts available if "an interested party or any other person * * * provides * * * information but the information cannot be verified * * *." 19 U.S.C. § 1677e(a)(2)(D). The statute does not define facts available, thus Congress has left the choice of facts to Commerce's discretion. According to the SAA, Commerce need not "prove that the facts available are the best alternative information. Rather, the facts available are information or inferences which are reasonable to use under the circumstances." SAA at 869. The relevant case law, requires that the choice of facts available bear a rational relationship to the subject matter at issue. *See Manifattura Emmeppi S.p.A. v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992)("[Commerce's] authority to select best information otherwise available is sub-

ject to a rational relationship between data chosen and the matter to which they are to apply.").

In this case, Commerce used cost estimates that MAN Roland prepares for every press at the time the customer signs the final agreement. Cost Verification Report at 8. The cost estimates submitted for the Rochester and Wilkes-Barre sales were prepared by MAN Roland in the ordinary course of business, prior to the initiation of this case. Germany Final at 38,186. These cost estimates were adjusted using the actual variance for a contemporaneous home market sale of the same model press. *Id.* at 38,186–87. Thus, the Court finds, Commerce's choice of facts available bore a rational relationship to the actual costs of the presses at issue.

MAN Roland states that Commerce received information on all of MAN Roland's completed LNPP projects since 1990 and that Commerce should have based its analysis on evidence provided for all of these sales rather than a single one. MAN Roland Brief at 26–27. However, as Commerce explained, it chose a single sale, HM4 because it was the only "fully-completed Geoman sale for which ITA had both detailed cost estimate sheets and actual costs from MRD's cost accounting system." N-P Doc. 39, at App. 17. The detailed cost estimate sheets were necessary, Commerce explains, because they "provided the information necessary to subtract costs included in the total estimate from actual costs incurred for completed projects." Commerce brief at 29 n.17. Furthermore, it was reasonable for Commerce to rely only on completed press sales. MAN Roland estimated costs for complete projects. Commerce needed to compare MAN Roland's estimates with actual costs in order to establish the variance between estimated costs and actual costs. Commerce would not make this comparison using incomplete projects because the actual cost figures for such projects also would be incomplete. Therefore, Commerce would not know which part of the estimate to compare to the available actual costs. Thus, Commerce's decision to rely on variance information from a single sale was reasonable.

Commerce's choice also was supported by substantial evidence. MAN Roland argues that HM6 was scheduled to be completed during the POI, and that Commerce's failure to use information related to this sale as well as the HM4 information was the result of "a simple misreading of the percentage completion schedule submitted on March 13, 1996 by MAN Roland." MAN Roland brief at 28. According to that schedule, which lists both the WIP balance and the percentage complete for each press as of September 30, 1995 and as of December 31, 1995, the figures given for HM6 are based on actual rather than estimated costs. The fact that actual costs were available for HM6, MAN Roland argues, indicates that the press must have been complete at the time MAN Roland submitted the schedule. However, the schedule also indicates that as of December 31, 1995, HM6 was only 85.21 percent complete. Thus, Commerce had substantial evidence indicating that HM4 was the only home-market Geoman press for which it had complete cost information.

3. *Overhead Variance Adjustment*

In its normal cost accounting system, MAN Roland calculates estimated overhead costs for each project by multiplying the direct labor costs for the project by fixed percentages. These percentages are not adjusted for projected or actual levels of activity in the factory. As a result, during periods when the factory is operating at high levels and direct labor costs increase, the estimated overhead costs also increase. However, *actual* overhead costs do not increase. Thus, when MAN Roland operates its production facilities at high levels, the estimated overhead costs overstate the actual overhead costs.[5] MAN Roland brief at 29.

MAN Roland's Rochester and Wilkes-Barre presses were not completely manufactured as of December 1, 1995, the cut-off date for MAN Roland's submissions to Commerce. In reporting the estimated cost of production for the incomplete presses, MAN Roland based its overhead variance on its first quarter results[6] for fiscal year 1996 (July 1, 1995–June 30, 1996) and its budgeted fiscal year 1996 variance.

Commerce rejected MAN Roland's adjustment and applied the actual variance from MAN Roland's most recently completed fiscal year, July 1, 1994–June 30, 1995. Germany Final at 38,187.

MAN Roland contends that, "[t]he actual variances from past years did not provide an accurate measure of the variance for the 1995–96 period, * * * " Brief of Pls. MAN Roland Druckmaschinen AG and MAN Roland Inc. Reply to Def.'s and Goss Graphics Systems, Inc.'s Resp. Briefs on Comp.- and Country-specific issues at 14 ("MAN Roland Reply brief"), and that "[t]he rationale offered by the department is * * * completely without merit and totally unsupported by evidence on the record." MAN Roland brief at 31.

Constructed value is defined in relevant part, as, "an amount equal to the sum of—(1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise * * * (2)(A) the actual amounts incurred and realized by the specific exporter or producer * * * for selling, general and administrative expenses, and for profits, * * *." 19 U.S.C. § 1677b(e). Thus Congress has allowed Commerce a

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[5] The level of direct labor costs depends heavily on the level of activity. Direct labor costs are wages paid to production workers. If those workers work additional hours because production is higher, the direct labor costs increase. Overhead includes expenses such as deprecation, rent, lighting and heating that do not vary directly with production.

[6] MAN Roland attempted to submit evidence regarding its actual operations level and variance for the first six months of fiscal year 1996 on March 13, 1996, but Commerce refused to accept the submission. MAN Roland brief at 31 n.42. MAN Roland argues that Commerce's refusal to accept the information was contrary to its regulations, because "[t]he regulations provide that a party may submit new information at any time up to one week before the start of verification." *Id.* (citing 19 C.F.R. § 353.31(a)(1)(i)). However, Commerce explains, "ITA did not * * * reject MRD's submission pursuant to section 353.31(a)(1)(i). Rather, ITA rejected the submission because it constituted a disguised 'resubmission' of MRD's previously-submitted Section D Response * * *. The determination of deadlines for questionnaire responses is fully within ITA's discretion." Commerce brief at 32 n.18 (citing 19 C.F.R. § 353.31(b)(2)). Commerce's explanation is reasonable. Commerce requested MAN Roland's variance information in its Section D Questionnaire and MAN Roland responded to that request. Commerce was under no obligation to accept additional information, submitted in response to the same request, after the questionnaire-response deadline had passed. *See Usinor Sacilor v. United States*, 18 CIT 1155, 1163–64, 872 F. Supp. 1000, 1008 (1994) ("Commerce has discretion to set time limits for the submission of a questionnaire response or other factual information requested * * *. Because Commerce must complete the investigation within strict statutory time limits, it is imperative that the requested information be submitted 'within a period that allows Commerce sufficient time for adequate analysis and comment while still meeting statutory deadlines.' * * * Thus, in general, the court has affirmed Commerce's rejection of corrections submitted after the deadline.") (citations omitted).

certain degree of discretion in choosing specific methodologies for calculating elements of CV such as overhead. Here, Commerce explained:

> MRD's budgeted variances do not accurately predict full-year operating results and rely on unrealistic capacity utilization levels. In addition, year-end adjustments or one-time annual costs may not be reflected in the part-year actual variance. Therefore, we rejected MRD's reported part-year actual variance and budgeted fiscal year variance calculation for fiscal 1996.

Germany Final at 38,187. Commerce's decision to reject MAN Roland's submitted variance was a reasonable application of the constructed value provision. The purpose of the antidumping scheme is to allow Commerce to calculate dumping margins as accurately as possible. *See Rhone Poulenc v. United States*, 8 Fed. Cir. (T) 61, 67, 899 F. 2d 1185, 1191 (1990) (stating that "the basic purpose of the statute," is "determining current margins as accurately as possible.") Thus, it is within Commerce's discretion to reject submitted information that may not accurately reflect actual costs. Furthermore, Commerce's decision was consistent with Commerce's longstanding preference for using actual rather than estimated costs. *See supra*, pg. 15–16. Commerce has the discretion to weigh the relative value of record evidence. "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

MAN Roland also argues that,

> the Department's alleged concerns about using partial-year variance are simply inconsistent with its past practice. The Department's normal practice has always been to calculate labor and overhead costs based on the costs incurred during the six-month investigation period—and not to use costs for longer 'complete' accounting periods.

MAN Roland brief at 32. However, the cases cited by MAN Roland in support of this argument had six-month POIs. In those cases, therefore, Commerce reasonably decided that a six-month variance most accurately approximated the respondents' actual POI experience. In this case, where the POI was two years, Commerce's decision that a six-month variance was not the most accurate approximation of respondents' actual POI experience was reasonable.

MAN Roland also argues that Commerce's decision was not supported by substantial evidence. Specifically, MAN Roland argues, "there was simply no evidence on the record to suggest that MAN Roland's budgets for its 1995–1996 * * * projected 'unrealistic capacity utilization levels.'" MAN Roland brief at 31. However, Commerce found that MAN Roland's capacity utilization estimates did not accurately predict actual utilization levels. *See* Cost Verification Report at 3 ("At verification, company officials indicated that MRD's plant capacity is 2.5 mil-

lion labor hours per year, * * *. Based on actual utilization data reported for the period July through December 1995, MRD exceeded its plant capacity by approximately 4.4% during these months."). MAN Roland argues that the fact that "there was simply no evidence on the record to suggest that MAN Roland's budgets for its 1995–1996—which were prepared in the normal course of business * * * projected 'unrealistic capacity utilization levels,'" because MAN Roland's capacity utilization was "*even higher*—and its variances even more favorable—than budgeted." MAN Roland brief at 31. Whether MAN Roland's projection understated or overstated its capacity utilization is irrelevant. The fact that the projection was inaccurate supports Commerce's conclusion that MAN Roland's projections are not as reliable as actual historical data.

Commerce appropriately rejected MAN Roland's submitted variance. Therefore, the Court finds, Commerce's decision to adjust MAN Roland's 1996 fiscal year overhead using the actual variance from fiscal year 1995, the most recent fiscal year for which complete information was available, was reasonable.

4. *Combining MAN Plamag and MAN Roland Production Costs*

In calculating its cost of manufacturing, MAN Roland argues, Commerce should have averaged the labor and overhead rates of MAN Roland's production facility with those of MAN Plamag, MAN Roland's wholly owned subsidiary. MAN Roland contends that,

> [u]nder the Department's established practice, where a respondent has the ability to produce the subject merchandise at two plants, the reported costs should reflect the weighted-average cost of manufacture at both plants—and not just the costs at the plant where the merchandise was actually produced. The Department has applied this approach in cases where the two facilities are owned by separate subsidiaries of the respondent—as long as the specific merchandise in question can be produced at both plants.

MAN Roland brief at 33.

In the final determination, Commerce said it did not average costs for MAN Roland and MAN Plamag because "MAN Plamag is a separate corporate entity from MRD. Specifically, MAN Plamag is an affiliated party to MRD (not a division or factory within MRD) * * *." Germany Final at 38, 188.

The Court finds Commerce's explanation to be insufficient. In *Certain Fresh Cut Flowers from Colombia*, 55 Fed. Reg. 20,491, 20,497 (Dep't Commerce 1990) (final results admin. review), Commerce agreed

to average the costs of production for two related companies.[7] Its position here appears to be at odds with the position it took in that case. "Commerce has the flexibility to change its position providing that it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence." *Cultivos Miramonte S.A. v. United States*, 21 CIT ___, 980 F. Supp. 1268, 1271 (1997) (footnotes omitted); *see also Hussey Copper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993)("'This rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure consistency in an agency's administration of the statute.'")(quoting *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988)). Therefore, the Court is remanding this issue for Commerce to reconsider its decision not to average MAN Roland's costs with MAN Plamag's.

5. *Highly Profitable Sales*

In calculating constructed value, Commerce is required to calculate an amount for profit based on the profit margins of sales of a foreign like product made "in the ordinary course of trade." 19 U.S.C. § 1677b(e)(2)(A). MAN Roland argues that in calculating its profit, Commerce should have disregarded certain highly profitable sales. MAN Roland brief at 35–37.

Commerce explained its refusal to exclude such sales from its profit calculation as follows:

> [w]e disagree with respondents that simply because certain home market sales had profits higher than those of numerous other sales, the profits are automatically abnormally high and outside the ordinary course of trade for purposes of computing CV profit. In order to determine that profits are abnormally high, there must be certain unique or unusual characteristics related to the sales in question. However, the respondents have provided no credible information other than the numerical profit amounts to support their contention that certain home market sales had abnormally high profits.

Germany Final at 38,178.

In response, MAN Roland maintains that because Commerce's interpretation confuses the concept "sales with abnormally high profits," with the concept "abnormal sales with high profits," "[Commerce's] interpretation cannot be correct." MAN Roland brief at 36.

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[7] Commerce also argues in its brief, that it did not average MAN Roland's and MAN Plamag's costs because MAN Plamag was not a producer of identical merchandise. *See* Commerce brief at 34–35. However, Commerce did not make this argument in the final determination. Therefore, it represents a post hoc rationalization by agency council. If Commerce chooses to rely upon this argument upon remand, it must reconcile its decision with *Flowers from Colombia*. In that case, Commerce averaged the costs of two companies even though it found that the flowers produced by the two farms were "somewhat different". 55 Fed. Reg. at 20,497. Commerce also should explain how its decision is consistent with *Silicon Metal from Brazil*. In *Silicon Metal*, Commerce averaged costs incurred at different furnaces in part because "other furnaces used to produce non-subject merchandise *can be used* to produce silicon metal." 59 Fed. Reg. 42,806, 42,808 (Dep't Commerce 1994) (final results admin. review) (emphasis added). In its brief in this case, however, Commerce argues that "it is irrelevant that MAN Plamag was able to produce LNPPs similar to the custom LNPPs produced by MRD's Augsburg plant and sold during the POI." Commerce brief at 35.

Although the Court agrees that Commerce's explanation is not a model of clarity, the Court finds Commerce acted within its discretion in including all profitable sales in its calculation of CV profit.

According to the statute, Commerce is to base SG&A and profit on sales made in the ordinary course of trade. The SAA explains that "* * * examples of sales that Commerce *could* consider to be outside the ordinary course of trade include sales of off-quality merchandise, sales to related parties at non-arm's length prices, and sales with abnormally high profits." SAA at 839–40 (emphasis added). Thus, Commerce has the discretion to decide under what circumstances highly profitable sales would be considered to be outside of the ordinary course of trade.[8]

In order for Commerce to exclude sales found to have been made *below* the cost of production, the statute requires that Commerce provide additional evidence demonstrating that such sales were actually outside the ordinary course of trade. *See* 19 U.S.C. § 1677b(b)(1). Similarly, Commerce's decision to require additional evidence demonstrating that sales with higher profits were outside of the ordinary course of trade was consistent with the statutory scheme and a reasonable construction of the provision at issue.

V. United States Price

1. *Use of Constructed Export Price*

In calculating a dumping margin, Commerce compares United States price to the normal value of the subject merchandise. United States price is calculated using either an export price ("EP") methodology or a constructed export price ("CEP") methodology.[9] Typically, Commerce relies on EP when the foreign exporter sells directly to an unrelated U.S. purchaser. CEP is used when the foreign exporter makes sales through a related party in the United States. *See Sharp Corp. v. United States*, 63 F.3d 1092, 1093–94 (Fed. Cir. 1995) ("The statute defines [U.S. price], * * * as either the United States purchase price [now EP] or the exporter's sales price [now CEP], whichever is appropriate * * *. Commerce uses the [CEP] if the foreign manufacturer imports through a related company in the United States.") (citations omitted).

For each of the relevant LNPP sales by MAN Roland to the United States, Commerce calculated U.S. price based on a CEP methodology. MAN Roland argues that two of its sales should have been treated as EP sales.

The antidumping statute defines EP as follows:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaf-

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[8] Commerce may not impose this requirement arbitrarily, however, nor may Commerce impose impossible burdens of proof on claimants. *See NEC Home Elecs. v. United States*, 54 F.3d 736, 745 (Fed. Cir. 1995) (holding that burden imposed to prove a level of trade adjustment was unreasonable because claimant could, under no practical circumstances, meet the burden).

[9] Prior to the Uruguay Round Agreements Act, EP sales were designated purchase price sales, while CEP sales were designated as exporter's sales price sales. "Notwithstanding the change in terminology, no change [was] intended in the circumstances under which export price versus constructed export price are to be used." H.R. Rep. No. 103-826(I) at 79 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3851.

> filiated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States * * *.

19 U.S.C. § 1677a(a). Constructed export price is defined as follows:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the exporter or producer * * *.

19 U.S.C. § 1677a(b).

When U.S. price is based on CEP, Commerce bases its calculations on the price charged to the first unaffiliated purchaser. This is the starting price. Commerce then makes certain adjustments including several that are not required for EP sales. The CEP adjustments "are made for certain amounts associated with the sale of merchandise in the United States, typically, commissions for selling the merchandise * * * and sales expenses generally incurred in selling the same type of merchandise in the United States." *PQ Corp. v. United States*, 11 CIT 53, 59, 652 F. Supp. 724, 730 (1987). The purpose of these adjustments is to prevent foreign producers from competing unfairly in the United States market "by spending amounts on marketing and selling their products that are in excess of what they spend in their home markets." *Id.* According to the SAA, "constructed export price is * * * calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." SAA at 823.

The statute does not specify the circumstances under which Commerce is to choose EP or CEP. However, according to the SAA,

> [i]f the first sale to an unaffiliated person in the United States, or to an unaffiliated purchaser for export to the United States, is made by the producer or exporter in the home market prior to the date of importation, then Commerce will base its calculation on export price. If, before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter, then Commerce will base its calculation on constructed export price * * *.

Id. at 822–23.

Thus, a sale to an unaffiliated party made prior to importation and involving a U.S. party affiliated with the producer or exporter could be an EP or a CEP sale. Therefore, in such a situation, "the determination of whether [EP] or [CEP] applies must be based upon additional circumstances." *PQ Corp.* at 60, 652 F. Supp. at 731. In *Certain Stainless Steel Wire Rods from France*, 58 Fed. Reg. 68,865 (Dep't Commerce 1993) (final det.), Commerce described the additional criteria it examines in deciding whether to use an EP or CEP methodology as follows:

> The first criterion is that the merchandise in question is shipped directly from the manufacturer to the unrelated buyer, without being introduced into the inventory of the related selling agent. The sec-

> ond criterion is that this arrangement is the customary commercial channel for sales of this merchandise between the parties involved. * * *
>
> The third criterion is that the related selling agent located in the United States acts only as a processor of sales-related documentation and a communication link with the unrelated U.S. buyer.

Id. at 68,868–69. Commerce will apply the EP methodology only if all three criteria apply to the sales at issue. *Id.* at 68,868. This test has been approved by this court. *See Independent Radionic Workers v. United States*, 19 CIT 375, 375 (1995)(describing Commerce's three criteria as "the judicially approved test").

Commerce applied the same criteria in this case, relying on the third criterion in its decision to base U.S. price on CEP.

> MRU's role with respect to the sales at issue is beyond that of a mere "processor of sales documentation" and "communications link." MRU played a major role in the negotiations between MRD and the U.S. customer for the Rochester and Wilkes-Barre sales, * * * and incurred significant SG&A expenses in the process. The contractual documentation and sales-related correspondence viewed at verification attests to this fact. Furthermore, we verified that MRU supports MRD's activities in the shipment and installation process relevant to these sales. This is evidenced by the fact that MRU is responsible for the post-sale warehousing of the merchandise shipped from Germany * * * as well as the contracting of rigging companies and the sourcing of auxiliary parts essential to the installation process in the United States.

Germany Final at 38,176.

MAN Roland argues that,

> the standard for distinguishing between export price and constructed export price sales is whether the performance of functions by the U.S. subsidiary changes "the substance of the transaction or the functions themselves." In other words, if the functions performed by the U.S. subsidiary could have been performed by the foreign parent, without any participation by the U.S. subsidiary, then the sale should be classified as an export price sale.

MAN Roland brief at 38 (citing *Stainless Steel Hollow Products from Sweden*, 52 Fed. Reg. 37,810, 37,811 (Dep't Commerce 1987) (final det.); *Certain Internal-Combustion, Industrial Forklift Trucks from Japan*, 53 Fed. Reg. 12,552, 12,553 (Dep't Commerce 1988) (final det.)).

> The evidence in this case demonstrates that all of the functions performed by MRU (MAN Roland's U.S. subsidiary) on the sales to Rochester and Wilkes Barre were routinely performed by its German parent (using unaffiliated local contractors where necessary) for its sales in many of the third-country markets it supplies * * *. Thus, MAN Roland's sales to Rochester and Wilkes Barre should properly have been treated as 'export price' sales."

MAN Roland brief at 39.

However, as Commerce explained, it is only in cases where the three EP elements are met, that,

> the Department has regarded the routine selling functions of the exporter as "merely having been relocated geographically from the country of exportation to the United States," * * *. [W]here the functions are performed "does not change the substance of the transactions or the functions themselves."

Germany Final at 38,175 (citing *Forklift Trucks from Japan*, 53 Fed. Reg. at 12,553). Only in such cases will Commerce apply the EP methodology.

In this case, Commerce provided substantial evidence demonstrating that the third criterion had not been met. Specifically, Commerce examined contractual documentation and sales-related correspondence indicating that MRU "played a major role in the negotiations between MRD and the U.S. customer * * * from the bidding stage through to the final contracts * * *." Germany Final at 38,176. Furthermore, the verification report demonstrates that MRU is responsible for the post-sale warehousing of the merchandise shipped from Germany, the contracting of rigging companies and the sourcing of auxiliary parts necessary for installation. *See* Verification QR. Responses of MRU, N-P Doc. 93 at 17 (post-sale warehousing expense); *id.* at 27 (installation costs). Thus, Commerce's decision to rely on CEP rather than EP in calculating U.S. price was appropriate.

2. *Further Manufacturing*

In calculating MAN Roland's U.S. price, Commerce treated installation of the subject merchandise as further manufacture. According to the statute, CEP is to be reduced by, "the cost of any further manufacture or assembly (including additional material and labor) * * *" 19 U.S.C. § 1677a(d)(2).

MAN Roland maintains that installation expenses for its Wilkes-Barre and Rochester sales should have been treated as movement-related expenses, pursuant to 19 U.S.C. § 1677a(c)(2)(A), which requires Commerce to reduce EP and CEP by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses * * * which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States."

The distinction is significant because Commerce calculates movement-related expenses without imputed profit. Further manufacturing costs, on the other hand, include an imputed profit attributable to the value added by the further manufacturing activities. *See* 19 U.S.C. § 1677a(d) ("For purposes of this section, the price used to establish constructed export price shall also be reduced by * * * (2) the cost of any further manufacture or assembly * * * and (3) the profit allocated to the expenses described in [paragraph] (2)."

MAN Roland argues that Commerce's decision would lead to absurd results because "MAN Roland is able to install LNPPs in distant foreign

countries using independent contractors, without any substantial investment in or support from a local subsidiary * * *." MAN Roland brief at 42. For example, MAN Roland argues, if MAN Roland had decided to install the U.S. sales from Germany using only independent local contractors, without any involvement by its U.S. subsidiary,

> the Department would have had to classify the sales as export sales. And * * * no adjustment could then have been made for further manufacturing costs * * *. The Department then would have been faced with two equally absurd options: It could continue to classify installation costs as further manufacturing costs, and make no adjustment for them at all [(the statute does not include a further manufacturing deduction for EP sales)]. Or, alternatively, the Department could hold that the cost of performing installation for such sales should be classified as movement charges * * * even though the costs of performing the identical operations would be classified as further manufacturing when supervised by a U.S. subsidiary.

MAN Roland brief at 42–43.

MAN Roland's hypothetical has no persuasive force. The Court must uphold Commerce's determination if it is in accordance with law and supported by substantial evidence. The statute does not define further manufacture. Therefore, the Court must defer to Commerce's interpretation if that interpretation is reasonable. Here, Commerce explained, it decided to treat installation costs as further manufacturing "because the U.S. installation process involves extensive technical activities on the part of engineers and installation supervisors and the integration of subject and non-subject merchandise necessary for the operation of LNPPs." Germany Final at 38,177. This decision was a reasonable interpretation of the statute. The statute does not require Commerce to analyze costs deducted as CEP costs to determine whether the activities generating such costs would be consistent with an EP transaction. The statute does require that Commerce deduct further manufacturing costs from CEP. Here, Commerce appropriately classified the sales at issue as CEP sales. Thus, Commerce was obligated to deduct the cost of further manufacture. Commerce's decision that the activities at issue here constituted further manufacture was consistent with Commerce's usual practice, which is to classify installation costs as further manufacture where the activities at issue include, "the incorporation of integral, non-subject components during installation or complex installation operations that are more than mere reassembly * * *." Germany Final at 38,177.[10] Therefore, the Court finds, Commerce's deduction of MAN Roland's installation costs as further manufacture was in accordance with law.

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[10] MAN Roland does not dispute that installation here involved the addition of integral non-subject merchandise.

VI. Goss's Issues

1. *Commerce's Cost Allocation for MAN Roland*

As explained above, after rejecting MAN Roland's submitted cost figures, based upon the ADK system, Commerce decided to rely on cost estimates prepared by MAN Roland prior to the initiation of the instant investigation. Goss agrees with Commerce's decision to reject the cost information submitted by MAN Roland. However, Goss argues, "Commerce made an error that incorrectly reduced the estimated cost." Goss brief at 11.

Commerce made certain adjustments to the cost estimates by breaking them down into categories (i.e., cost of manufacturing, SG&A, and profit).

"The error arose," explains Goss, "because Commerce had to create a constructed value from two sets of data * * *." *Id.* at 12. During the investigation, MAN Roland reported actual SG&A costs that Commerce verified. Commerce decided to subtract the estimated SG&A from MAN Roland's estimates, and add in the actual SG&A. The cost estimates did not break out SG&A, so Commerce tried to back the estimated SG&A out of the cost estimates by using the reported SG&A ratio.

The SG&A ratio is used to allocate SG&A costs to individual projects. The ratio is calculated by dividing the total SG&A costs for all projects within a pool by an allocation base, here, total cost of production for all the projects in the pool. The ratio is multiplied by the cost of production of individual projects to calculate the SG&A costs that should be allocated to them. However, Goss explains, in the cost estimates submitted by MAN Roland to Commerce, the SG&A ratio had been calculated based on a denominator that excluded the cost of purchased parts worth more than DM 500. Goss Brief at 14 (citing MAN Roland Section D response at 27). Commerce multiplied this ratio by the full cost of production for individual projects. Therefore, the subtracted SG&A amounts were inflated. *Id.*

Goss requests that the Court remand this issue so that Commerce may apply the appropriate allocation ratios to MAN Roland's estimated costs. *Id.* at 15. Commerce agrees that it erred in allocating SG&A expenses and also requests a remand so that it may correct its error. Def.'s Mem. Opp. Motion Goss Graphic Systems, Inc., J. Agency Rec. Country/Company-Specific Issues at 14 ("ITA understated the COM because the estimated cost data submitted by MRD did not include the cost of certain parts * * *. Therefore, ITA agrees that the case should be remanded to allow ITA to determine a more accurate cost allocation * * * using the information contained in the administrative record.").

MAN Roland opposes the remand, arguing, "[i]f the Department really had been authorized to rely on 'facts available' in this case, then the choice it made was well within its discretion." Brief of Pls. MAN Roland Druckmaschinen AG and MAN Roland Inc. Opp. Mot. J. Agency Rec. Goss Graphic Sys., Inc. Comp.- and Country-Specific Issues at 10 ("MAN Roland Response Brief").

MAN Roland's argument is flawed, however. Commerce did not make a choice here. Commerce's use of an estimated SG&A ratio based on less than the cost of production was inadvertent. As MAN Roland itself acknowledges, "[a]s a matter of simple arithmetic, the denominator used to calculate an expense rate must be determined on the same basis as the figures to which the rate will be applied." MAN Roland brief at 16.[11]

In *Koyo Seiko Co. v. United States*, the Court observed that "[t]here can be no doubt that Congress intended final determinations to be precisely that." 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). However, the court added, "failure to reopen a determination which is known to be based on erroneous factual information that would clearly mandate a change in result would itself be arbitrary and capricious." *Id.* at 683, 746 F. Supp. at 1111 (citing *Timken Co. v. United States*, 7 CIT 319, 320 (1984)). *See also Federal-Mogul Corp. v. United States*, 18 CIT 1168, 1171–72, 872 F. Supp. 1011, 1014 (1994) (granting Commerce's request for remand to correct "inadvertent" factual errors).

As in *Koyo Seiko* and *Federal-Mogul*, Commerce's determination here contained a factual error. Therefore, the Court remands this issue so that Commerce may correct it.

2. *The Inclusion of Canadian Expenses in MAN Roland's U.S. Warranty Expenses*

In calculating CEP for MAN Roland, Commerce deducted an amount for warranty expenses incurred by MRU on subject sales pursuant to 19 U.S.C. § 1677a(d)(1)(B). Section 1677a(d)(1) requires that Commerce reduce CEP by "the amount of any of the following expenses incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise * * * (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties * * *."

Commerce's normal practice in computing warranty expenses is to use historical data from a four- or five-year period preceding the filing of the petition to estimate the probable warranty expenses on POI sales. *See* Germany Final at 38,184. "The underlying rationale for this practice is the recognition that, in many industries, warranty costs on sales made during the POI might not occur until long after the POI and, consequently, POI sales cannot be tied to their associated actual warranty expenses for reporting purposes." *Id.*

Goss does not object to Commerce's use of historical data to calculate warranty expenses. In this case, however, the warranty expense rate reported by MAN Roland and used by Commerce in the final determination, was calculated using both U.S. and Canadian warranty cost data. Goss argues that the warranty expense rate should be recalculated using only U.S. warranty expense data. "Sales to Canadian purchasers are

[11] MAN Roland made this argument in protesting Commerce's allocation of MRU's indirect selling expenses. In that situation, however, the Court agreed with Commerce's allocation methodology. Commerce used the same allocation base, i.e. sales value, to calculate the allocation ratio, and to allocate the expenses to individual sales. Commerce simply chose to use a different *pool* of sales—i.e., sales realized rather than sales made—to calculate the ratio. As the Court explained, this choice was within Commerce's discretion. *See supra* at 11–16.

not subject to investigation and warranty expenses on those sales are not directly related to sales in the United States. Therefore, the quoted language prohibits their use in the warranty adjustment to CEP." Goss Brief at 16 (referring to 19 U.S.C. § 1677a(d)(1).

However, Commerce did not deduct warranty expenses incurred on past Canadian sales or on past U.S. sales. The information about these sales was provided so that Commerce could calculate a warranty *rate* that it applied to the sales under investigation to calculate estimated warranty expenses. Commerce has consistently used respondents' historical warranty data to calculate warranty expenses for subject sales and there is nothing in the statute requiring Commerce to exclude information about third-country sales from such historical data.

In addition, Commerce explained, it did not have sufficient information on the record to segregate the Canadian sales information without distorting its calculation. *See* Germany Final at 38,185. Thus, Commerce's decision to rely on MAN Roland's submitted data was a permissible exercise of Commerce's discretion and consistent with "the basic purpose of the statute: determining current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 8 Fed. Cir. (T) 61, 68, 899 F. 2d 1185, 1191 (1990).

Commerce's decision also was supported by substantial evidence. Commerce stated that "the warranty expense rate inclusive of the foreign sales reasonably reflects MRU's actual experience on sales whose warranty period has been completed * * *." Germany Final at 38,185. On March 13, 1996, MAN Roland submitted information regarding total warranty costs for seven sales made during the four-year period Commerce used to calculate historical warranty costs. The information demonstrates that the average warranty amount calculated by Commerce was consistent with MRU's actual warranty costs on sales for which the entire warranty period fell within the four-year period. *See* MAN Roland's Response to Commerce's Supp. QR., N-P Doc. 81, App. 9.

Thus, the Court finds, Commerce's decision to include warranty costs for third-country LNPP sales was in accordance with law and supported by substantial evidence.

VII. Commerce's Choice of Facts Available for KBA

In the antidumping petition, Rockwell Graphic Systems, Inc. (now Goss) calculated the margin of dumping for Germany basing United States price (export price) upon the bid price and detailed cost information for a single LNPP sale by MAN Roland to a United States customer, MAN Roland's Rochester sale. *See* Def.'s Mem. Opp. Motion Koenig & Bauer-Albert AG and KBA-Motter Corp. for J. Agency Rec. at 2–3 ("Def.'s KBA Brief"). To calculate an export price, Goss adjusted the bid price by deducting installation charges, foreign and U.S. movement charges, training, a [spare parts allowance] and Customs duties. Goss based these deductions on its own experience, price quotations from suppliers of certain services, and the Harmonized Tariff Schedule of the United States (for customs duties). *See* Petition Imposition of Anti-

dumping Duties, Vol. 2, N-P Doc. 1 at 11 ("Petition"). Goss based normal value on constructed value. Def.'s KBA Brief at 2–3. In calculating normal value, Goss used German costs where available and where German market data was not available, it relied on its own experience. In the petition, Goss estimated the dumping margin for Germany to be 67.67 percent. *Id.* at 3–4.

In estimating the German dumping margin for purposes of the initiation of its antidumping duty investigation, Commerce modified Goss's methodology for calculating constructed value to arrive at an estimated dumping margin of 46.40 percent. *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany and Japan*, 60 Fed. Reg. 38,546, 38,548 (Dep't Commerce 1995) (notice of initiation).

On August 28, 1995, Commerce presented KBA with an antidumping questionnaire. KBA did not respond. In a letter, KBA explained that it produces presses in both Germany and the United States and that it anticipated that future U.S. LNPP sales would be manufactured by KBA's U.S. facility. For that reason, KBA explained, "the expenditure of resources by the KBA Group * * * to show that the past sale of a KBA German origin LNPP was not sold at less-than-fair-value is not economically justifiable." Letter of Sept. 25, 1995, N-P Doc. 88 at 3.

In the final determination, based on information supplied by MAN Roland, Commerce again reduced the margin on the sale identified in the petition. MAN Roland's final margin, based on all of its POI sales was calculated to be 30.72 percent. Mem. Re: Alleged Ministerial Errors in the Final Antidumping Duty Margin Calculation—MAN Roland, N-P Doc. 113. Because KBA failed to respond to Commerce's questionnaire, Commerce used facts otherwise available to determine a dumping margin for KBA pursuant to 19 U.S.C. § 1677e. Commerce also determined that KBA had failed to cooperate in the investigation, and that the use of adverse facts available was warranted. *See* Germany Final at 38,167. Commerce assigned to KBA the 46.40 percent margin from the notice of initiation. *Id.*

KBA objects to Commerce's decision to apply the margin from the notice of initiation, modified from the margin alleged in the petition, as facts available. KBA acknowledges that prior to the URAA, the statute gave Commerce great discretion in choosing facts available.[12] KBA also acknowledges that in most respects, the current law is similar to the pre-URAA statute with respect to the use of facts available or BIA. However, KBA argues, "[t]he URAA * * * substantively changed U.S. law in one key respect relevant to this appeal." Specifically, KBA argues, "[u]nder the new law, when ITA relies on secondary information as facts otherwise available, ITA must now, to the extent practicable, *corroborate* that information using 'independent sources.'" KBA brief at 11 (citing 19

[12] The terminology has changed. The pre-URAA statute mandated the use of best information available ("BIA") in cases in which a person refused or was unable to produce information. *See* SAA at 868.

U.S.C. § 1677e(c)).[13] Secondary information is, among others, information derived from the petition. SAA at 870. "Independent sources may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review * * *. Corroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value." *Id.* KBA argues that, "[h]aving decided that the most appropriate proxy for estimating KBA's dumping margin was the margin on the MAN Roland sale alleged in the petition, ITA should have corroborated the margin assigned to KBA with the actual margin ITA calculated for this sale based on the verified data in MAN Roland's final questionnaire response." KBA Brief at 12.

In the final determination, Commerce stated,

> we corroborated all of the secondary information on which the margin in the petition was based during our pre-initiation analysis of the petition to the extent appropriate information was available for that purpose at the time. * * * For the final determination, we compared the petition price information with verified data on the record and again found that it continued to be of probative value. Nothing in the statute or the SAA compels us to go beyond these procedures."

Germany Final at 38,179–80.

Commerce is correct. In assigning a dumping margin to KBA, Commerce never decided that MAN Roland's Rochester sale was the most appropriate proxy. Commerce decided that information from the petition was an appropriate proxy, as it was entitled to do. The information in the petition included some information specific to the Rochester sale, particularly, an approximate bid price. However, the petition also relied on a variety of sources of information including price quotes from suppliers of goods and services, publicly available data appearing in MAN Roland's annual report, publicly available data regarding German market conditions and Goss's own experience. *See* Petition, Vol. 2, at 3–48.

In the absence of information specific to KBA, the sources relied on in Goss's petition were acceptable substitutes. Commerce corroborated all of the information from which the margin was calculated during its pre-initiation analysis, "to the extent appropriate information was available for this purpose at that time." *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany*, 61 Fed. Reg. 8035, 8036 (Dep't Commerce 1996)(prel. det.). After analyzing Goss's data, Commerce made certain adjustments prior to issuing its notice of initiation. Specifically, Commerce excluded all reported depreciation expenses, profit and interest from Goss's calculations. *See* 60 Fed. Reg. at 38,548.

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[13] "When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority * * * shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c).

At the preliminary and final determination stages, Commerce corroborated the data that it could not corroborate at the initiation stage—i.e. non-public information specific to MAN Roland—based on information provided by MAN Roland during the investigation.

After comparing MAN Roland's verified data with the petition data, Commerce decided that the data in the petition continued to be of probative value. *See* Memo re: Corroboration of Petition Information, N-P Doc. 69; Memo. re: Corroboration of Petition Information for Purposes of the Final Determination, N-P Doc. 106. This was a reasonable decision. The bid price used by Goss was within two percent of the actual selling price of the LNPP at issue. The total adjustments to the bid price were within 25 percent of the adjustment data provided by MAN Roland and verified by Commerce. Furthermore, Commerce discovered, based on MAN Roland's submission, that although the bid price in the petition tended to overstate the dumping margin, the adjustments tended to understate the margin, thus indicating that Goss had been conservative in its calculations, and that the total discrepancy in export price data, between the petition and MAN Roland's verified data was less than two percent. Thus, the Court finds, Commerce fulfilled its obligation to corroborate secondary information relied on as facts available.

This was not a situation in which Commerce's investigation called into question the publicly available information contained in the petition. *Compare Borden Inc. v. United States*, slip op. 98–36 (CIT March 26, 1998) ("[E]ven where the petition is based on apparently reliable public data, if it is called into question by Commerce's investigation, as is the data here, the petition data must be corroborated by data apart from itself."). This is also not a situation in which Commerce has relied on information that has been invalidated. *Compare D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997) (deciding under the 1988 version of the antidumping law that "[i]nformation that has conclusively been determined to be inaccurate does not qualify as the 'best information' under any test, and certainly cannot be said to serve the 'basic purpose' [of the statute] of promoting accuracy.").

KBA failed to cooperate with Commerce's investigation. Commerce was not obligated to assume that information submitted by MAN Roland was more probative of KBA's experience than the German market data and other information contained in Goss's petition. In fact, Commerce had a right to assume that the petition information was more probative of KBA's experience because if KBA could have submitted information demonstrating that it ought to receive a lower margin, it would have done so.[14] *See Rhone Poulenc*, 8 Fed. Cir. at 67, 899 F.2d at 1190 ("We believe a permissible interpretation of the best information statute allows the agency to make such a presumption [in favor of the use of a higher rather than a lower margin as BIA] and that the pre-

[14] In this case, KBA explained that it did not think it would be worthwhile financially to respond to Commerce's questionnaire. However, that does not change the general rule, that where a respondent fails to participate in an investigation, Commerce may employ adverse inferences about the missing information.

sumption is not 'punitive.' Rather, it reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, * * * would have produced current information showing the margin to be less.").

Commerce corroborated the information in Goss's petition to the extent required by the statute. Therefore, the Court finds, Commerce's use of that information, and the margin from the notice of initiation was in accordance with law.

CONCLUSION

For the reasons set out above, Commerce's final determination in *Large Newpaper Printing Presses from Germany* is remanded for Commerce to reconsider its decision not to combine MAN Roland's costs with those incurred by MAN Plamag, and to recalculate MAN Roland's SG&A costs using an appropriate allocation ratio. Commerce's determination is sustained in all other respects.

(Slip Op. 98–96)

U.S. STEEL GROUP—A UNIT OF USX CORP, AND BETHLEHEM STEEL CORP, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND AG DER DILLINGER HÜTTENWERKE, DEFENDANT-INTERVENOR

Court No. 97–05–00866

[ITA determination remanded.]

(Dated July 7, 1998)

Dewey Ballantine LLP, (Michael H. Stein, Bradford L. Ward, and *Jennifer Danner Riccardi)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, *(Delfa Castillo),* Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Bernd G. Janzen,* Attorney-Adviser, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

LeBoeuf, Lamb, Greene & MacRae, L.L.P., (Pierre F. de Ravel d'Esclapon, Mary Patricia Michel, and *William C. Sjoberg)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on U.S. Steel Group's, a Unit of USX Corporation, and Bethlehem Steel Corporation's (collectively "Domestic Producers") and AG der Dillinger Hüttenwerke's ("Dillinger") cross-motions for judgment on the agency record, pursuant to USCIT R. 56.2. Under review are the Department of Commerce's ("Commerce") final results in the second antidumping duty administrative review of *Certain Cut-To-Length Carbon Steel Plate from Germany,* 62 Fed. Reg. 18,390 (Dep't Commerce 1997) (final results) [hereinafter "*Final Results*"].

Before the court, the Domestic Producers raise the following arguments: (1) Commerce incorrectly calculated the ratio applied to total actual profit in calculating constructed export price ("CEP"), and (2) Commerce erred in failing to deduct antidumping ("AD") and countervailing ("CVD") duties from CEP. Dillinger, in its motion, raises the following arguments: (1) Commerce erred in its classification of Dillinger's U.S. sale as a CEP sale, and (2) even if Commerce properly classified Dillinger's U.S. sale as a CEP sale, it erred by deducting related party commissions in the CEP calculation.

I. FACTS

A. Procedural Background

On August 19, 1993, Commerce published an antidumping duty order on, *inter alia*, certain cut-to-length carbon steel plate from Germany. *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Germany*, 58 Fed. Reg. 44,170, 44,171 (Dep't Commerce 1993) (orders). The final margin imposed on Dillinger pursuant to that order was thirty six percent. *Id.* Commerce subsequently conducted an administrative review of Dillinger's sales, which resulted in an antidumping duty of 2.61%. *Certain Cut-To-Length Carbon Steel Plate from Germany*, 61 Fed. Reg. 26,159, 26,160 (Dep't Commerce 1996) (amended final results).

On August 16, 1995, Dillinger requested a second administrative review of its sales of certain cut-to-length carbon steel plate during the period of review ("POR"), from August 1, 1994 through July 31, 1995. *Letter from Leboeuf, Lamb, Greene & MacRae L.L.P. to the U.S. Department of Commerce* (Aug. 16, 1995), at 1, P.R. 2, D.P. App., Tab 1, at 3. On September 8, 1995, Commerce published a notice initiating the second administrative review of the antidumping duty order on certain cut-to-length carbon steel plate from Germany. *Cold-Rolled and Corrosion Resistant Carbon Steel Flat Products and Certain Cut-To-Length Carbon Steel Plate from Various Countries*, 60 Fed. Reg. 46,817, 46,817 (Dep't Commerce 1995) (notice of initiation).

On October 4, 1996, Commerce preliminarily determined that there was no margin of dumping for Dillinger, and classified Dillinger's sale as an export price ("EP") transaction. *Certain Cut-to-Length Carbon Steel Plate from Germany*, 61 Fed. Reg. 51,907, 51,907–08 (Dep't Commerce 1996) (prelim. results) [hereinafter "*Preliminary Results*"]. At a hearing on November 22, 1996, both sides extensively discussed the characterization of Dillinger's U.S. sale as EP and other issues. *U.S. Department of Commerce Public Hearing Transcript* (Nov. 22, 1996), at 4–41, P.R. 93, D.P. App., Tab 8, at 30–67. Commerce issued its *Final Results* on April 15, 1997, categorizing Dillinger's U.S. sale as a CEP sale and calculating a final margin of three percent. *Final Results*, 62 Fed. Reg. at 18,391, 18,395.

B. Domestic Producer's Motion

1. Movement Expenses in CEP Profit Calculation

Because Commerce determined in the *Final Results* that Dillinger's U.S. sale was a CEP transaction, 62 Fed. Reg. at 18,391, Commerce made adjustments pursuant to 19 U.S.C.A. § 1677a(d) (West Supp. 1998), including reducing the price used to establish CEP by the profit allocated to expenses described in § 1677a(d)(1) and (2).[1] Thus, Commerce calculated the total U.S. expenses component of the profit allocation ratio by summing U.S. commissions, U.S. direct expenses (credit), U.S. indirect expenses, and U.S. inventory carrying costs which become the numerator in a percentage applied to total actual profit. *See U.S. Department of Commerce Internal Memorandum from N. Decker to the File* (Apr. 2, 1997), at 2, P.R. 97, D.P. App., Tab 9, at 49 [hereinafter "*Analysis Memorandum*"]. Movement expenses were not included in this uncontested calculation.

In calculating the total expenses component for the denominator of the applicable percentage, Commerce summed Dillinger's total cost of goods sold (general and administrative expenses, interest expenses, packing expenses, and cost of manufacture) and total selling expenses (direct expenses, commissions, and indirect selling expenses). *Id.* at 3, D.P. App., Tab 9, at 50. Commerce also included total *movement expenses* (total U.S. and home market movement expenses). *Id.* Domestic Producers challenge this approach, of including movement expenses in the denominator but not in the numerator of the "applicable percentage," as contrary to the statute and non-proportional.

2. Deduction of Antidumping and Countervailing Duties from CEP

Section 1677a(c)(2)(A) of Title 19 provides that the price used to establish EP and CEP shall be reduced by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties." 19 U.S.C.A. § 1677a(c)(2). Before the agency, Domestic Producers argued that Commerce must deduct actual antidumping and countervailing duties from the price used to establish EP or CEP. *Final Results*, 61 Fed. Reg. at 18,394. Relying on the language of the statute and the legislative history, Domestic Producers argued that the phrase "any * * * United States import duties" includes AD and CVD because such duties are "incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." *Id.*

Commerce rejected Domestic Producers' argument, noting its longstanding position that AD and CVD duties are not a cost within the meaning of § 1677a(c)(2)(A). *Id.* at 18,395. Specifically:

> AD and CVD duties are unique. Unlike normal duties, which are an assessment against value, AD and CVD duties derive from the margin of dumping or the rate of subsidization found. Logically, AD and

[1] Adjustments under 19 U.S.C.A. § 1677a(c) are made to both EP and CEP sales. Section 1677a(d) applies to CEP sales only.

> CVD duties cannot be part of the very calculation from which they are derived.

Id. Commerce concluded that such double counting, i.e., accounting for the same unfair trade practice twice is unjustifiable. *Id.* Domestic Producers challenge this reasoning.

C. Dillinger's Motion

1. EP v. CEP Sales Classification

From the initial investigation through the first administrative review and the preliminary results of the second administrative review, Commerce has addressed the issue of whether the sales activities of Dillinger's U.S. affiliate, Francosteel Corporation ("Francosteel"), were such that Dillinger's U.S. sales were properly classifiable as EP sales rather than as CEP sales. In all of the previous determinations, Commerce classified Dillinger's sales as EP sales. *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Germany*, 58 Fed. Reg. 37,136, 37,139–40 (Dep't Commerce 1993) (final determ.); *Certain Cut-to-Length Carbon Steel Plate from Germany*, 61 Fed. Reg. 13,834, 13,843 (Dep't Commerce 1996) (final review) [hereinafter "*First Administrative Review*"]; *Preliminary Results*, 61 Fed. Reg. at 51,908. For example, in the *First Administrative Review*, Commerce stated that:

> [a]lthough Francosteel takes title to the merchandise and participates in sales negotiations, we found at verification that it *does not have the flexibility to set the price of the steel* and only acts as a processor of sales-related documentation.

61 Fed. Reg. at 13,843 (emphasis added).

For the first time in the *Final Results* of the second administrative review, Commerce classified Dillinger's sale, an "uncomplicated sale" in Dillinger's processing terminology, as a CEP transaction, stating:

> [i]n the first administrative review, [Commerce]'s determination that Francosteel acted merely as a processor of sales-related documentation was based mainly upon the finding that Francosteel lacked "the flexibility to set the price of the steel." We have determined that this was not the case during the present review.

Final Results, 62 Fed. Reg. at 18,392 (citations omitted). Dillinger seeks restoration of EP status.

2. Deduction of Commissions in CEP Calculation

Section 1677a(d)(1)(A) of Title 19 instructs Commerce to deduct from the CEP starting price "commissions for selling the subject merchandise in the United States." In the *Analysis Memorandum*, Commerce deducted commissions paid by Dillinger to Daval and Francosteel under the variable "COMMISU." *Analysis Memorandum*, at 1–2, D.P. App., Tab 9, at 48–49.

Commerce investigated the commissions paid by Dillinger to Daval SA ("Daval") and by Daval to Francosteel throughout the second administrative review. Dillinger responded in its questionnaire response:

> Both Daval and Francosteel are related to Dillinger through its parent, Usinor Sacilor. * * * Dillinger pays Daval [a] percent of the FOB European port value of the plate on all U.S. sales for its services. Daval, in turn pays Francosteel [a] percent of this FOB value. * * * There are no other intracompany sales commissions * * *. These payments do not depend on the customer or class of customer. Nor do these payments depend on the product subcategories or any other criteria. The amounts reported in the computer tape are not allocated. Rather, they are the actual amounts paid.
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> * * * * * * *
>
> Dillinger is unable to prove that the commissions it pays Daval and Francosteel are arm's length transactions. Dillinger does not use any unrelated commissionaires in the U.S. Dillinger also does not have any information indicating what the general industry practice is in the U.S. regarding commissions.

Dillinger's Questionnaire Response (Nov. 13, 1995), at 18–19, P.R. 27, Dillinger's App., Tab 3, at 55–56.

Commerce's verification report on U.S. sales reviewed whether commissions paid to Francosteel and Daval in the U.S. market were at arm's-length. *U.S. Sales Verification Report* (June 13, 1996), at 14, C.R. 20, D.P. App., Tab 8, at 47. Commerce concluded that the amount reported is the amount Dillinger pays to Daval and that Daval pays to Francosteel. *Id.* No discrepancies were found. *Id.* Moreover, Commerce noted that "Francosteel stated that they are unable to demonstrate the arm's length nature of commissions as all unrelated sales involve separate buying and selling functions rather than commissioned sales." *Id.*

In the *Preliminary Results*, Commerce categorized Dillinger's U.S. sale as EP and determined that no dumping margin existed for Dillinger. 61 Fed. Reg. at 51,907–08. In the *Final Results*, Commerce changed the categorization of Dillinger's sale to CEP. 62 Fed. Reg. at 18,391. In response to this change, Commerce also deducted commissions paid by Dillinger to Daval and Francosteel from CEP. *See Analysis Memorandum*, at 1–2, D.P. App., Tab 9, at 48–49 (commissions are indicated by variable "COMMISU" and are subtracted from CEP). Dillinger argues this was incorrect given the relatedness of the parties.

II. Jurisdiction and Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994), as this is a challenge to a final antidumping duty determination under 19 U.S.C. § 1516a (1994).

In reviewing the final results of an antidumping administrative review, the court must determine whether Commerce's interpretation and application of the antidumping statute is supported by substantial evidence and is in accordance with the law. *See* 19 U.S.C. § 1516a(b)(1)(B).

III. DISCUSSION

A. Domestic Producers' Motion

1. Movement Expenses in CEP Profit Calculation

Pursuant to 19 U.S.C.A. § 1677a(d)(3), the price used to establish constructed export price shall be reduced by "the profit allocated to the expenses" described in 19 U.S.C.A. § 1677a(d)(1) (selling expenses) and 19 U.S.C.A. § 1677a(d)(2) (cost of any further manufacture or assembly). For the purpose of § 1677a(d)(3), "profit shall be an amount determined by multiplying the total actual profit by the applicable percentage." 19 U.S.C.A. § 1677a(f)(1). The statute defines the applicable percentage as "the percentage determined by dividing the total United States expenses by total expenses." *Id.* § 1677a(f)(2)(A). Total United States expenses in the applicable percentage are defined as "the total expenses described in subsection (d)(1) and (2) of this section." *Id.* § 1677a(f)(2)(B). It is Commerce's practice to exclude movement expenses from the total U.S. expenses numerator. *See Import Administration Policy Bulletin 97-1*, (Sept. 4, 1997), at 7, Def.'s App., Ex. 1, at 7. Total expenses are defined as "*all* expenses * * * which are incurred * * * with respect to the *production and sale* of such merchandise." 19 U.S.C.A. § 1677a(f)(2)(C) (emphasis added).

Domestic Producers contend that Commerce's inclusion of movement expenses in the "total expenses" denominator is contrary to the express terms of the statute and Commerce's past practice. For this purpose, Domestic Producers contend that total expenses are limited to "all expenses * * * with respect to the *production and sale* of such [subject] merchandise." *See* 19 U.S.C.A. § 1677a(f)(2)(C) (emphasis added).[2] The Domestic Producers argue that movement expenses are defined separately in 19 U.S.C.A. § 1677a(c)(2)(A)[3], and that this provision covers expenses exclusive of those addressed as selling expenses in 19 U.S.C.A. § 1677a(d)(1), and manufacturing expenses in 19 U.S.C.A.

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[2] Section 1677a(f)(2)(C) reads in its entirety:

(C) Total expenses

The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

(i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.

(ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

(iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

19 U.S.C.A. § 1677a(f)(2)(C).

[3] Section 1677a(c)(2)(A) defines movement expenses as:

costs, charges, or expenses and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.

19 U.S.C.A. § 1677a(c)(2)(A).

§ 1677a(d)(2).[4] Because of this distinction among expenses, Domestic Producers contend that movement expenses cannot be included in the total expense denominator as a subset of production or sales expenses. Furthermore, Domestic Producers contend that Commerce's construction of the statute is unreasonable because it disrupts the symmetry and proportionality between the ratio of total U.S. expenses and total expenses. The court agrees.

In the instant case, the language defining total expenses is not entirely clear as to whether movement expenses should be included in the total expenses denominator.[5] *See* 19 U.S.C.A. § 1677a(f)(2)(C). The statute defines "total expenses" as "all expenses * * * with respect to the production and sale of such [subject] merchandise." 19 U.S.C.A. § 1677a(f)(2)(C). Commerce suggests that the plain language of the statute instructs it to identify "all expenses," including movement expenses, and that the subsequent reference to "production and sale" is no more than a general requirement that the expenses be linked to the subject merchandise.

The broad reading of the statute, which Commerce proposes, negates the meaning of the limiting language referring to selling and production expenses. This is no reason to presume Congress included these specifications by happenstance, or only to show that the expenses are linked to the subject merchandise and foreign like product. It likely included the language to mirror the numerator, which is explicitly limited to selling and manufacturing expenses. Thus, one might conclude that the broader structure of the statute, if not the language of the provision itself, resolves the issue in favor of the Domestic Producers' interpretation. Assuming *arguendo* that there is some ambiguity, the court considers the reasonableness of Commerce's interpretation.

The arguments Commerce advances in support of its construction of the statute are not persuasive, and the interpretation of total expenses for this purpose, which includes movement expenses, is unreasonable. First, Commerce's interpretation is unreasonable because it conflicts with its past practice of consistently distinguishing between movement and production or selling expenses in other circumstances. *See, e.g.*, *Furfuryl Alcohol from the Republic of South Africa*, 62 Fed. Reg. 61,084, 61,091 (Dep't Commerce 1997) (final results) (classifying expenses in-

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[4] Section 1677a(d)(1) and (2) of Title 19 read:

(d) Additional adjustments to constructed export price

For purposes of this section, the price used to establish constructed export price shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(c) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C);

(2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e) of this section.

19 U.S.C.A. § 1677a(d)(1) & (2).

[5] Moreover, the Statement of Administrative Action ("SAA") does not support Commerce's position, but neither does it definitively support that of the Domestic Producers.

curred for shipping insurance purposes as movement expense and not a direct selling expense); *Silicon Metal from Brazil*, 62 Fed. Reg. 47,441, 47,444 (Dep't Commerce 1997) (amended final results) ("inland freight is a movement expense, and not a selling expense"); *Certain Stainless Steel Wire Rods from France*, 62 Fed. Reg. 7206, 7212 (Dep't Commerce 1997) (final results) (warehousing is a movement expense and not a selling expense).

Second, Commerce incorrectly discounts the proportionality that must logically exist between the total and total U.S. expenses. Total U.S. expenses over total expenses constitutes the applicable percentage. 19 U.S.C.A. § 1677a(f)(1). Logically, the numerator and the denominator of this ratio should be drawn from the same pool of expenses. The SAA implies that such a proportionality should exist. It indicates that the CEP profit deduction should reflect "the proportion which the U.S. manufacturing and selling expenses constitute of the total manufacturing and selling expenses." Statement of Administrative Action, accompanying H.R. Rep. 5110, 103rd Cong., at 824 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773. Accordingly, the same types of costs should be used in both sides of the ratio. Commerce has not demonstrated that such proportionality should not exist.[6] Therefore, movement expenses may not be included in the denominator of the ratio to be applied to actual total profit.

2. Deduction of AD/CVD Duties from CEP

Section 1677a(c) of Title 19 lays the framework for calculating the price upon which the antidumping margin is based. The provision calls for Commerce to increase the export and constructed export price by, *inter alia*, "the amount of any countervailing duty imposed on the subject merchandise * * * to offset an export subsidy." 19 U.S.C.A. § 1677a(c)(1)(C). Section 1677a(c)(2)(A) specifies that the price should be reduced "except as provided for in paragraph (1)(C)," by:

> the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.

19 U.S.C.A. § 1677a(c)(2)(A).

Domestic Producers argue that Commerce must deduct actual antidumping and countervailing duties from the price to establish EP or CEP. Relying on the language of the statute and the legislative history, Domestic Producers argue that the phrase "any * * * United States import duties" includes AD and CVD duties because such duties are "inci-

[6] The court was open to any explanation that would support abandonment of proportionality because of unique antidumping concerns. Commerce offered no such reason even when specifically requested to do so, in advance of oral argument. Defendant's attempted delinquent post-argument memorandum provides no answer. It offers no sensible reason why the ratio applied to total actual profit should not be proportional. It assumes the ratio is *disproportionate* if movement expenses are excluded from both sides of the ratio. This is not logical. Furthermore, defendant has cited nothing which indicates that total *actual* expenses for determining total actual profit must be defined in the same manner as total expenses for purposes of the ratio. Whether movement expenses are to be included in the actual profit calculation is an issue not before the court.

dent to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States."

Specifically, Domestic Producers contend that the failure of the drafters to define "United States import duties" in the Antidumping Act of 1921 indicates that Congress intended only the ordinary meaning for this term, which according to Domestic Producers includes both AD and CVD duties. Additionally, Domestic Producers point to the 1979 Trade Agreement Act's specific exclusion of CVD imposed to offset export subsidies from the reduction to CEP and EP for import duties for support of their claim that AD and CVD duties are included in "United States import duties." Otherwise, the exempting phrase would be redundant. Commerce argues that the addition required by § 1677a(c)(1)(C) lowers the dumping margin by the amount of the export subsidy. Commerce claims that this addition of export-subsidy countervailing duties to the price in the United States cannot be deprived of its logical effect by an offsetting deduction, and this is the sole reason for the reference to export subsidies in § 1677a(c)(1)(c).

Relying on an extension of the holdings of several cases, Domestic Producers also argue that AD and CVD duties should be deducted from U.S. price because the amounts are determinable and not estimates. Furthermore, Domestic Producers claim that Commerce's explanation that such a deduction would result in double-counting is unreasonable because of the clear statutory mandate to deduct AD and CVD duties from U.S. price. Domestic Producers maintain that, even if it were a legitimate policy rationale, the policy cannot apply to countervailing duties which are designed to offset the amount of subsidization benefitting the subject merchandise, and not the amount of price discrimination.

While Domestic Producers' statutory construction arguments raise concerns about Commerce's interpretation, the statute may still be seen as ambiguous and the court will not reject its previous holding in *AK Steel Corp. v. United States*, 988 F. Supp. 594 (Ct. Int'l Trade 1997). The facts and arguments in *AK Steel* as to AD and CVD duties in general are strikingly similar to those in the present case. There, as here, the domestic producers contest Commerce's decision not to deduct antidumping and countervailing duties from U.S. price when calculating the dumping margin. *Id.* at 607. The court held that the term "United States import duties" is not defined, and upheld Commerce's interpretation as reasonable. *Id.*

In doing so, the court rejected the claim that *PQ Corp. v. United States*, 11 CIT 53, 652 F. Supp. 724 (1987) and *Federal-Mogul Corp. v. United States*, 17 CIT 88, 813 F. Supp. 856 (1993), implicitly endorse the deduction of actual antidumping duties. *See AK Steel*, 988 F. Supp. at 608. The court noted Commerce's longstanding policy against such a practice and Commerce's rational concern that a deduction of AD and CVD duties from U.S. price would result in double-counting. *Id.* at 607–08. Double-counting would result if an additional deduction was

made from U.S. price for the same AD duties that were used to offset pricing discrimination between the two markets. *Id.* at 607. The court also explicitly stated that Commerce's rationale applied to countervailing duties as well. *Id.* at 607–08.[7] The court stated further that the impermissible double-counting would still result even if antidumping and countervailing duties were defined as falling within "additional costs, charges, and expenses," instead of "United States import duties." *See id.* at 608 n.12.

Further, in *Hoogovens Staal BV v. United States*, Consol. Ct. No. 96–10–02394, Slip Op. 98–27, 1998 WL 178720 (Ct. Int'l Trade Mar. 13, 1998), the petitioners also asked for a remand so that Commerce could deduct antidumping duties as "United States import duties" or other "costs, charges or expenses" from U.S. price. *Id.* at 5, 1998 WL 178720, at *2. The court, as in *AK Steel*, held that the definition of the terms "United States import duties" and "costs, charges and expenses" is unclear. *Id.* at 18, 1998 WL 178720, at *6. The court also held that Commerce's decision not to deduct antidumping duties as "United States import duties" or other cost is a reasonable interpretation of the statute in accordance with the law. *Id.* at 219, 1998 WL 178720, at *7. Echoing the holding in *AK Steel*, the court noted that "Commerce's long-standing policy and practice is not to treat estimated or final antidumping or countervailing duties as import duties or costs under 19 U.S.C. § 1677a(d)." *Id.* at 18, 1998 WL 178270, at *6.[8]

Domestic Producers respond expressly for the first time in their reply brief that Commerce's rationale does not apply to the treatment of countervailing duties imposed to offset non-export subsidies. The Domestic Producers assert that domestic subsidies are not presumed to have any particular price effect, and are not presumed to have equal price effects in the home and U.S. markets. Accordingly, Domestic Producers argue that Commerce has failed to demonstrate that the deduction of *non-export* CVD duties from U.S. price would result in a double remedy or an impermissible double-counting.

The court has upheld Commerce's interpretation that countervailing duties should not be deducted from U.S. price, based on Commerce's position against double-counting. *See AK Steel*, 988 F. Supp. at 607–08. Domestic Producers ask the court to make a narrow exception to this

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[7] Note that Article VI(5) of the GATT provides that:

> [n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

As the U.S. antidumping laws are generally intended to be GATT consistent, Commerce's desire to avoid double remedies is legitimate.

[8] Domestic Producers claim that *AK Steel* is wrongly decided because the court determined the definition of "United States import duties" to be ambiguous without explicitly considering legislative history that would, according to them, prove otherwise. The Domestic Producers cite to the 1921 Antidumping Act. *See* S. Rep. No. 67–16, at 10–14. In doing so, the Domestic Producers admit that the legislative history of the 1921 Act is silent as to the definition of the term "United States import duties." Allegedly this indicates that Congress intended for the phrase "United States import duties" to have its ordinary meaning and thus would include all duties imposed by the United States on imports, such as antidumping and countervailing duties and "custom duties" identified elsewhere in the statute. Domestic Producers point to *C.J. Tower & Sons v. United States*, 71 F.2d 438, 445 (C.C.P.A. 1934), as an example of this interpretation. Domestic Producers' argument is not persuasive, especially in light of their admission that the legislative history is silent as to the definition of "United States import duties." While the language of *C.J. Tower* is supportive, its holding is not on point.

general rule and find that Commerce's interpretation and rationale are unreasonable as applied to the deduction of countervailing duties designed to offset non-export subsidies.

Based on the information presented, the distinction that Domestic Producers attempt to make between the export and non-export countervailing duties is not a viable one. The double counting concern is still relevant if Commerce decides to deduct non-export countervailing duties. Logically, the deduction of a countervailing duty, whether export or non-export, from the U.S. price used to calculate the antidumping margin would result in a double remedy for the domestic industry. Commerce has already corrected for the subsidies on the subject merchandise in the countervailing duty order, thereby granting the domestic industry a remedy. To deduct such countervailing duties from U.S. price would create a greater dumping margin, in effect a second remedy for the domestic industry. Therefore, Commerce's rationale for not deducting countervailing duties is reasonable as applied to both export and non-export countervailing duties.

B. Dillinger's Motion

1. EP v. CEP Sales Classification

In making its determination, Commerce applied the three-part sales classification test developed in response to *PQ Corp. v. United States*, 11 CIT 53, 652 F. Supp. 724 (1987), and followed in *Independent Radionic Workers of America v. United States*, No. 86–12–01551, Slip Op. 95–45, 1995 WL 116219, at *1 (Ct. Int'l Trade Mar. 15, 1995).[9] Its conclusion turned on the third prong of the test, whether "the related selling agent located in the United States acts only as a processor of [sales-related] documentation and a communication link between the foreign producer and the unrelated buyer." *Final Results*, 62 Fed. Reg. at 18,391. Thus, the crux of the current controversy, whether the change from EP to CEP was correct, focuses on Dillinger's relationship with Francosteel, and the latter's activity in the sales transaction. The parties rely on the following record evidence in stating their positions.

On October 17, 1995, Dillinger submitted its response to Section A of Commerce's antidumping questionnaire. *See Dillinger's Section A Response* (Oct. 17, 1995), at 1, C.R. 2, D.P. Response App., Tab 1, at 1. Dillinger described the functions performed by Francosteel as the following:

> Francosteel negotiates with the U.S. customer on a case-by-case basis. This applies to both service centers/distributors and end-users. Francosteel is as well responsible for such charges as maritime insurance, customs duty upon entry in the U.S. and U.S. brokerage and wharfage. Some customers require delivery to their plants. Francosteel invoices customers and is responsible for collection of payment. Francosteel serves as the importer of record. Dillinger

[9] Dillinger does not challenge the applicability of the *PQ* test itself and that issue is not decided here.

> provides technical service, warranty and other after-sales service, advertising.

Id. at 9–10, D.P. Response App., Tab 1, at 15–16. Dillinger explained that "Francosteel has no price list for the American market" and "[p]rices are negotiated with individual customers on a case-by-case basis, relative to the existing market conditions for a given product." *Dillinger's Revised Section A Response* (Oct. 19, 1995), at 13, P.R. 17, Dillinger's App., Tab 2, at 26. Additionally,

> [w]hen negotiating U.S. price, Francosteel's plate sales people try to achieve the highest selling price possible under the particular market conditions prevailing at the time of sale. Francosteel's plate manager is guided by ongoing discussions with Dillinger regarding the price levels in the U.S. for sales of common plate qualities. Francosteel consults Dillinger for pricing on "project sales," *i.e.*, those presenting particular technical issues. Before Francosteel accepts a particular order from a customer, it holds discussions with Dillinger and obtains Dillinger's approval.

Id. Finally, in describing its back-to-back invoicing process for U.S. plate sales, Dillinger explained that "Francosteel must pay Dillinger according to certain terms of payment, which have no direct link with the receipt of payment by Francosteel from the U.S. customer." *Id.* at 16, Dillinger's App., Tab 2, at 29.

Francosteel's responsibilities change somewhat according to the complexity of the sale. In "uncomplicated sales," such as those involving repeat orders from an existing customer, Francosteel is guided by Dillinger's "periodic guidance as to what minimum price levels to seek in the U.S. market." *Id.* at 14, Dillinger's App., Tab 2, at 27; *see also Sales Verification Report* (June 13, 1996), at 4–5, Dillinger Reply Br., Tab 2, at 4–5. In this type of sale, Francosteel's sales people negotiate the highest price possible and then submit the order to Dillinger for approval. *U.S. Sales Verification Report*, at 4, P.R. 71, Dillinger's App., Tab 6, at 4.

In more complex sales or "project sales" involving a type of plate not commonly produced by Dillinger, Francosteel obtains the customer's specifications and sends them to Dillinger. *Dillinger's Revised Section A Response*, at 14, Dillinger's App., Tab 2, at 27. Dillinger will inform Francosteel, sometimes after several rounds of negotiations with the customer via Francosteel, of its approval of the specifications and price quotation. *Id.*

In response to Commerce's supplemental questionnaire on the specific issue of Francosteel's authority to negotiate sales independently of Dillinger, Dillinger asserted:

> [i]n all cases Dillinger sets the terms of sale, including price. In uncomplicated sales, as in complex sales, Dillinger always reserves the right to refuse an order entered through Francosteel's computer system. However, as a general rule, such a situation usually does not occur because the Product Manager at Francosteel, through daily telephone contact with Dillinger, is constantly aware of the

> terms which would be acceptable to Dillinger, and he therefore will make no offers inconsistent with these terms.

Dillinger's Supplemental Section A Response (Feb. 14, 1996), at 13, P.R. 49, Dillinger's App., Tab 4, at 18. With its Supplemental Response Dillinger provided a price list for the fourth quarter of 1994. *Id.*

Once an order is received from the customer, Francosteel conducts a credit check on the customer. *U.S. Sales Verification Report*, at 5, Dillinger's App., Tab 6, at 5. Once this credit analysis is complete, Francosteel enters the sales information into a computer system and transmits it electronically to Dillinger. *Id.* at 4, Dillinger's App., Tab 6, at 4. Upon review of the information, Dillinger confirms the sale with Francosteel. *Id.* Production does not begin until Dillinger's sales confirmation. *Id.* at 5, Dillinger's App., Tab 6, at 5. Dillinger produces and ships the merchandise and, once shipped, Dillinger sends Francosteel an invoice. *Id.* Francosteel in turn issues an invoice to the customer, usually when the merchandise arrives in the United States. *Id.*

Commerce verified the portions of Dillinger's questionnaire responses concerning Francosteel's role in the U.S. sales process for plate. The verification report summarized Francosteel's pre-production role in the U.S. sales process as:

> Customer sends an inquiry (orally or written) to Francosteel. Francosteel firms up details before forwarding to the mill for technical and sales responses. The mill returns with more technical questions or with a minimum price (if the technical aspects are clear). The minimum price sent by Dillinger is an effective price to the customer (Dillinger knows it will get slightly less than that because the price includes expenses paid by Francosteel – insurance, brokerage, wharfage, and duty). If Francosteel thinks it can get more than the minimum price guideline, it will. The minimum price is dictated to Francosteel by the mill, although Francosteel negotiates with the customer to get the best price possible.

Id. at 4, Dillinger's App., Tab 6, at 4.

In their administrative brief, Domestic Producers argued that contrary to Commerce's finding in the *Preliminary Results*, Dillinger's U.S. sale was a CEP transaction. Domestic Producers noted that Francosteel performed numerous substantial functions beyond processing sales-related documentation because it:

> purchases the subject merchandise from Dillinger and resells it * * *; bears all risks of loss; acts as the importer of record for Dillinger plate sales; takes title to the subject merchandise, and retains title to the merchandise for a substantial period of time following exportation; holds itself out as the seller of the subject merchandise to its U.S. customers; finances the sale of subject merchandise to its U.S. customers; and provides numerous additional services and incurs additional expenses on behalf of its sales of the subject merchandise. Moreover, Francosteel creates and retains substantially more documentation regarding sales of the subject merchandise

> than would be the case if it were merely a document processor and communication link.

Dom. Prod. Case Brief, at 5–6.

In the *Final Results* Commerce classified the U.S. sale as a CEP transaction because Francosteel acted "as more than a processor of sales documents and a communications link between the unrelated U.S. customer and Dillinger." 62 Fed. Reg. at 18,391. Specifically, Commerce concluded that Francosteel "played a major role in negotiating and bringing about the sale, from the bidding stage through the final contract" and has "the flexibility to set the price of the steel" while Dillinger's sales role was "minimal." *Id.* at 18,391–92. Furthermore, Commerce listed Francosteel's specific sales activities for the period as follows: (1) Francosteel either solicited or responded to the initial U.S. customer contact; (2) Francosteel received U.S. customers' purchase orders; (3) Francosteel reviewed the U.S. customer's credit history (*i.e.*, ran a credit check on the U.S. customer); (4) using pricing and term guidelines provided by Dillinger, Francosteel negotiated the sale with the U.S. customer; (5) Francosteel took title to the merchandise; (6) Francosteel acted as importer of record; and (7) Francosteel invoiced the U.S. customer. *Id.* Dillinger does not dispute the fact that Francosteel performs these sales functions.

On appeal, Dillinger argues that its involvement in the sales negotiation process was direct. Dillinger argues that it responded to specific customer inquiries with a price quote or established initial price guidelines for merchandise regularly produced by Dillinger.[10] Dillinger provided daily guidance to Francosteel regarding prices and specifications of merchandise. Once an agreement was reached, Francosteel filled out an order sheet, checked the credit rating, and entered the information into the computer to share with Dillinger. Dillinger reviewed the order, and if in compliance, sent a confirmation to the customer. Thus, Dillinger argues that it, not Francosteel, set and could change the terms of sale up to the shipment date.

Commerce has devised a test which increasingly hinges on the subtle distinctions of the phrase "more than a processor of sales-related documentation and a communications link." This is not an easily administrable test and the court suggests that Commerce attempt to draw some sharper lines.

In the meantime the court must review application of the test used here. The court concludes that substantial evidence supports Commerce's decision that Francosteel played a more substantial role than in other cases where CEP classification was permitted. The record indicates that Francosteel actually negotiated for price above the Dillinger set minimum, whether or not Dillinger could in theory reject the price at

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[10] Domestic Producers argue that this factual assertion is unsupported by the record. Domestic Producers note that while the Home Market Verification Report states that Dillinger has daily contact with Francosteel, nothing explicitly indicates that these contacts relate to price negotiation. Rather, Domestic Producers argue that the evidence suggests that Dillinger's main involvement in the pricing of uncomplicated sales is to issue quarterly price guidelines. The evidence is not clear in this regard.

a later time, that in the case of this "uncomplicated sale" communication was not on a continuous basis, and Francosteel has flexibility to make decisions on its own as to price. These factors, combined with all the normal selling functions, which have not always led to CEP classification, legitimately may be viewed as pushing this sale over the edge into the CEP rather than the EP category.

2. Commission Deduction from CEP

Section 1677a(d)(1)(A) of Title 19 instructs Commerce to reduce the price used to establish CEP by the amount of "commissions for selling the subject merchandise in the United States." The parties have noted the court's description of Commerce's pre-Uruguay Round practice with respect to commissions between related parties:

> Commerce generally does not make an adjustment for commissions paid to related parties. Commissions paid to related parties are considered intra-company transfers of funds, and, as such, do not qualify for a circumstances-of-sale adjustment. As intra-company transfers of funds, these payments are considered to be part of the general operating expenses of the company, and not costs directly related to particular sales.

Outokumpu Copper Rolled Prods. v. United States, 18 CIT 204, 209, 850 F. Supp. 16, 21 (1994) (citations omitted). As described in *Outokumpu Copper*, in general, with respect to a circumstances of sale adjustment, Commerce applied a two prong test to determine whether an adjustment for related party commissions are appropriate: (1) "the commissions must be directly related to the specific sales," and (2) "the commission arrangement must be the result of arm's length negotiations." *Id.* To determine the second prong of the test, Commerce:

> first compares the commissions paid to related and unrelated sales agents in the same market. If there are no commissions paid to unrelated parties, Commerce then compares the commissions earned by the related selling agent on sales of merchandise produced by the respondent, to commissions earned on sales of merchandise produced by other unrelated sellers or manufacturers. In appropriate circumstances, Commerce will also "examine the nature of the agreements or contracts between the manufacturer[s] and selling agent[s] which establish the framework for payment of commissions and for services rendered in return for payment."

Id. (quoting *Coated Groundwood Paper from the United Kingdom*, 56 Fed. Reg. 56,403, 56,406 (Dep't Commerce 1991)).

Based upon the affiliation of Francosteel and Daval, Dillinger argues that Commerce erred by deducting the commissions in its CEP calculation because it is Commerce's practice to assume that commission payments in related party transactions are not at arm's length, and not to require that respondents prove that such payments are intra-company transfers. Thus, Dillinger requests a remand to Commerce to "simply recalculate U.S. price without making a deduction for the related party

commissions," with all other aspects of the calculation remaining the same. Dillinger Reply Br. at 11.

In response to Dillinger's argument, Domestic Producers argue that Dillinger is barred from raising this issue because it failed to exhaust its administrative remedies by not contesting Commerce's earlier decisions with respect to commissions in the context of the normal value calculation. In this situation, the fact that Dillinger did not contest the treatment of commissions for other purposes is insufficient to bar the argument. First, Commerce did not decide to deduct U.S. commissions from CEP until the *Final Results*, leaving Dillinger with only one forum in which to contest this determination, the court. It was the change to CEP and the deduction of US commissions from CEP that created a dumping margin and thus prompted Dillinger to contest the determination.[11] This change, at least under the facts here, is sufficient to make commissions for CEP purposes a separate issue that could not have been contested before the agency.

In the alternative, Domestic Producers argue that the remand should not be granted because Commerce did not err in its determination. They argue that Dillinger's interpretation of Commerce's practice, that Commerce *assumes* that commission payments in related party transactions are not at arm's length, and not to require that respondents prove that such payments are intra-company transfers, is incorrect.[12] Rather, Dillinger, having sole control over the relevant information, has the burden of proving that the commissions were *not* at arm's length. Domestic Producers argue that Dillinger has failed to meet this burden as it relied on statements about home market commissions, "self serving" claims, and inadequate responses to Commerce's questionnaire.

The court in *Outokumpu Copper*, 18 CIT at 210, 850 F. Supp. at 22, implicitly addressed the burden of proof issue regarding commissions paid to a related party in the U.S. for circumstances of sale adjustment purposes. In *Outokumpu Copper*, petitioners contested Commerce's remand determination that the respondent's commissions were indirect, rather than direct selling expenses. *Id.* at 208, 850 F. Supp. at 20. Specifically, petitioners asserted that Commerce improperly failed to place the burden of proof on respondents to demonstrate that the payments were not made at arm's length. *Id.* at 210, 850 F. Supp. at 22. The court held that:

> Commerce seeks to determine whether the payments between related parties were made at arm's length. Commerce does not seek to prove that such payments were not made at arm's length. Commerce has chosen to operate under the assumption that commission payments in related party transactions are not at arm's length. [Petitioners] essentially argue that Commerce should abandon this presumption when considering related party commissions in the US market, and instead presume that the related party commis-

[11] The NV calculation is not challenged and may not be altered.

[12] Commerce also disagrees with Dillinger's interpretation of its practice, but did not articulate what the correct interpretation is.

> sions were made at arm's length. Commerce, however, has rejected the argument that related party commissions should be considered under different standards depending upon the market in which the commission is paid.

Id. at 210–11, 850 F. Supp. at 22.

Domestic Producers argue that the holding in *Outokumpu Copper* cannot apply to situations where respondents are in sole control of the relevant information. Domestic Producers rely on *Creswell Trading Co., Inc. v. United States*, 15 F.3d 1054, 1060 (Fed. Cir. 1994), for the proposition that when information is solely in the control of one party, the burden of production is placed on that party.

While this statement generally may be true, the holding of *Creswell Trading* is of limited use here.[13] Further, Dillinger does not want a commission deduction for CEP purposes and did not point to an incentive to come forward with information on this point.[14] Moreover, Commerce also admitted at oral argument that its practice has not always been consistent with *Outokumpu Copper*. Treatment of commissions under the newly amended statute is not identical to that required by the statute applied in *Outokumpu Copper*. None of the parties explained well what burdens Commerce should now be imposing on respondents with regard to the facts involved in the various treatments of commissions under the statute.

The court finds it unnecessary to resolve these sub-issues at this stage of the proceedings. As indicated, there is an explicit statutory direction to deduct commissions from the sales price of CEP sales. *See* 19 U.S.C.A. § 1677a(d)(1)(A). The statute appears to require the expense represented by commissions to be deducted whether or not the producer/exporter and U.S. selling agent are affiliated. *Id.* Of course, if because of the relatedness of the producer and U.S. selling agent expenses represented by the commissions are already accounted for by means of a deduction for selling expenses nominally made under another provision of 19 U.S.C.A. § 1677a(d) or the expense does not truly exist, no additional commission deduction need be made.

Here, Commerce requests a remand because it may have double-counted certain U.S. expenses by deducting under "COMMISU" the commissions paid by Dillinger to Daval and by Daval to Francosteel, as well as Francosteel's indirect selling expenses. The court finds that Commerce erred by not analyzing whether because of the relatedness of the parties double-counting occurred.[15] Thus, this issue is remanded to Commerce to follow the statute's instruction and make a deduction

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[13] As was made clear in *U.S. Steel Group v. United States*, 18 CIT 1190, 1204–09, 873 F. Supp. 673, 689–92 (1994), *aff'd*, 96 F.3d 1352 (Fed. Cir. 1996), the particular burden shifting at issue in *Creswell Trading* cannot resolve most CVD-AD inquiries.

[14] Whether it would have on balance an incentive because of the NV calculation was not discussed.

[15] Before the court, Commerce stated:

> While we do not accept Dillinger's characterization of Commerce's practice, we nevertheless recognize that Commerce *may have erred* in calculating Dillinger's antidumping margin for the *Final Results*.

This court has repeatedly held that it will not grant a remand to the agency without a finding that the agency erred. *Wheatland Tube Co. v. United States*, 973 F. Supp. 149, 158 (Ct. Int'l Trade 1997). To remand without a finding of error negates the finality of the agency decision.

from CEP for expenses attributable to commissions. Based on the facts specific to this case, at this stage the only acceptable reasons to not make a separate "COMMISU" deduction are: (1) because the expense does not truly exist; or (2) because the expense represented by such a deduction is otherwise accounted for under 19 U.S.C.A. § 1677a(d).

CONCLUSION

For the foregoing reasons, the court upholds Commerce's classification of Dillinger's U.S. sale as CEP and its treatment of antidumping and countervailing duties in calculating CEP. The court remands to Commerce to remultiply total actual profit by a ratio which does not include movement expenses in the total expenses denominator. The court also remands to Commerce to determine whether it over accounted for commissions in reductions to CEP and if so to correct its calculation. Remand results are due within sixty days. Objections are due twenty days thereafter, responses eleven days thereafter.

(Slip Op. 98–97)

US JVC CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–01–00192

[Defendant's motion to dismiss for lack of jurisdiction is granted.]

(Dated July 7, 1998)

Galvin & Mlawski, (Jack D. Mlawski) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(John J. Mahon);* Office of Assistant Chief Counsel, United States Customs Service *(Beth C. Brotman)*, of counsel, for defendant.

OPINION

GOLDBERG, *Judge:* In this case, the Court decides whether the ninety-day period for filing a protest in 19 U.S.C. § 1514(c)(3) (1994) is subject to equitable tolling. Both parties agree that plaintiff, US JVC Corp. ("JVC"), failed to protest the liquidation of certain color television receivers from Taiwan within ninety-days after Defendant, the United States Customs Service ("Customs"), issued bulletin notices of liquidation. The parties disagree, however, on how this fact should affect the outcome of this case. Customs argues that the failure to file a timely protest deprives the Court of subject-matter jurisdiction. On the other hand, JVC contends that the Court can, and indeed should, equitably toll the ninety-day period when Customs notifies an importer that liquidation of its merchandise is suspended, and proceeds to liquidate it anyway. Although sympathetic to JVC's position, the Court holds that the

ninety-day period for filing protests set forth in 19 U.S.C. § 1514(c)(3) is not subject to equitable tolling. Thus, the Court is forced to dismiss this action for lack of subject-matter jurisdiction.

BACKGROUND

This case revolves around the premature liquidation of seventeen entries of color television receivers imported by JVC between April 4, 1990 and November 11, 1990. The receivers were manufactured in Taiwan by Kuang Yuan Co., Ltd. ("Kuang Yuan") and were subject to an antidumping duty order. *Color Television Receivers, Other Than Video Monitors, From Taiwan; Antidumping Duty Order*, 49 Fed. Reg. 18337 (Apr. 30, 1984) *("Taiwanese Receivers")*. As a result, when JVC entered the receivers into the United States, it was required by law to deposit estimated antidumping duties with Customs.[1] *See* 19 U.S.C. § 1673e (assessment of duty); 19 U.S.C. § 1675 (administrative review of determinations). Shortly thereafter, Customs notified JVC in writing that liquidation of the entries was suspended.

In early 1992, Commerce initiated its seventh administrative review of the antidumping duty order, which ultimately set the actual antidumping rate for color television receivers imported from Taiwan between April 1, 1990 and March 31, 1991, including the receivers imported by JVC at issue here. *See Color Television Receivers, Except for Video Monitors, From Taiwan; Preliminary Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 555 (Jan. 7, 1992); *Color Television Receivers, Except for Video Monitors, From Taiwan; Final Results of Antidumping Administrative Review*, 57 Fed. Reg. 20241 (May 12, 1992) *("Final Results Seventh Review")*. On January 9, 1992, pending completion of the seventh review, Commerce directed Customs to continue to suspend the liquidation of the receivers manufactured by Kuang Yuan until it was specifically instructed otherwise. *See E-Mail No. 2009116* (Jan. 9, 1992) (Director, Import Specialist Division to Regional Directors, Commercial Operations District, Area and Port Directors).

Contrary to these directions, on February 28, 1992, Customs erroneously liquidated the seventeen entries of receivers at the estimated antidumping duty deposit rate(s) and posted bulletin notices of the liquidations. Meanwhile, because JVC knew that Commerce had ordered Customs to suspend the liquidation of receivers manufactured by Kuang Yuan, and because the receivers that it imported were manufactured by Kuang Yuan, JVC never checked to see if bulletin notices of liquidation were posted for its entries. Thus, JVC was unaware of Customs' mistake.

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[1] Neither party discusses either what antidumping duty deposit rate(s) applied to JVC, or how much money JVC deposited with, and ultimately paid to Customs. The Court infers from the record that Customs used two different deposit rates, depending upon when the receivers entered the United States: a rate of 5.46 percent was used for receivers entered before May 23, 1990; and a rate of .54 percent was used for receivers entered after May 23, 1990. *See Taiwanese Receivers*, at 18338 (all others rate); and *Color Television Receivers, Except for Video Monitors, From Taiwan; Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke in Part*, 55 Fed. Reg. 21210, 21212 (May 23, 1990) (Kuang Yuan rate).

On May 12, 1992, Commerce published the final results of the seventh administrative review. It determined that, for the period of review, no antidumping duties should be assessed on the receivers manufactured by Kuang Yuan. *Final Results Seventh Review*, 57 Fed. Reg. at 20245. Subsequently, on September 27, 1995, Commerce instructed Customs to liquidate the color television receivers at issue here with a dumping margin of 0.00 percent.[2]

At some point thereafter, JVC asked Customs to refund the estimated antidumping duty deposits for the seventeen entries. Customs denied this request, presumably because the seventeen entries had already been liquidated almost four years earlier. On December 26, 1995, JVC filed a protest challenging the premature liquidations, which Customs denied one day later because it was untimely. JVC then filed suit in this Court, arguing first that the Court should equitably toll the time limitation for filing a protest; and second that Customs should refund the estimated antidumping duties that JVC deposited with Customs. Customs responded by filing the instant motion to dismiss for lack of subject-matter jurisdiction.

DISCUSSION

Title 28 U.S.C. § 1581(a) confers exclusive jurisdiction in the Court of International Trade over suits against the United States "to contest the denial of a protest, in whole or in part." This jurisdictional grant is not unqualified, however, and must be read to incorporate the requirements of 19 U.S.C. § 1514. *Juice Farms Inc. v. United States*, ____ Fed. Cir. (T) ____, ____, 68 F.3d 1344, 1345 (1995). Section 1514(a) provides that "decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to * * * the liquidation or reliquidation of an entry * * * shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section * * *." Section 1514(c)(3), in turn, states that "[a] protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after * * * notice of liquidation or reliquidation * * *." Read together, the ramification of these sections is clear: a protest must have been timely filed under 19 U.S.C. § 1514(c)(3) for this Court to obtain jurisdiction over a suit that contests its denial.

JVC concedes, as it must, that it failed to comply with these statutory requirements. After all, no change liquidations are protestable deci-

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[2] After Commerce published the final results, several review participants challenged their validity on unrelated grounds. *See AOC Int'l v. United States*, 18 CIT 1102 (1994). As a result, over three years elapsed before Commerce instructed Customs to liquidate JVC's entries. JVC suggests that an order issued by the reviewing court in *AOC Int'l* is relevant in this case. The order enjoined Customs from liquidating entries of color television receivers manufactured by, *inter alia*, Kuang Yuan. *See Compl.* ¶ 9; Pl.'s Resp. to Def.'s Mot. to Dismiss for Lack of Jurisdiction at 2 ("Pl.'s Resp."). JVC's suggestion is without merit. The reviewing court explicitly limited the scope of the order to those entries that Customs had not yet liquidated on June 12, 1992. *See* Order Granting Prelim. Inj., Ct. No. 92-06-00371 (June 12, 1992). Hence, by definition, the order could not include the entries at issue here because they had already been liquidated on February 28, 1992.

sions under 19 U.S.C. § 1514(a).[3] *LG Elecs. U.S.A. v. United States*, ___ CIT ___, ___, 991 F. Supp. 668, 673 (1997). Here, Customs posted bulletin notices of the seventeen liquidations on February 28, 1992.[4] And, JVC failed to file a protest challenging them until December 26, 1995, nearly four years later. Plainly then, JVC did not comply with the statutory filing requirements for protests.

Notwithstanding this, JVC contends that dismissal for lack of subject-matter jurisdiction is unwarranted because under equitable tolling principles, the Court may excuse its error. JVC's logic proceeds as follows. Drawing on the Federal Circuit's decision in *Juice Farms*, JVC first argues that the Court of Appeals for the Federal Circuit has recognized that the time period imposed by 19 U.S.C. § 1514(c)(3) contains an implied exception for equitable tolling. *See* Pl.'s Resp. at 4. JVC then posits that equitable tolling is justified in this case because JVC would have checked for bulletin notices of liquidation, and thus discovered that its entries had been liquidated in time to file a timely protest, if JVC had not received written notices from Customs stating that its entries would not be liquidated until the results of the seventh administrative review were finalized.[5] *Id.* at 5.

Customs' central response to this argument is factual. That is, Customs does not dispute that courts can toll the ninety-day period for filing protests. *See* Def.'s Resp. to Pl.'s Opp'n to Def.'s Mot. to Dismiss for Lack of Jurisdiction at 7–8 ("Def.'s Reply"). Instead, it argues the circumstances described by JVC do not justify doing so. Specifically, Customs contends that equitable tolling is only available when a prospective defendant has *induced* or *tricked* a plaintiff into allowing a

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[3] When the estimated antidumping duty rate for an entry is the same as its actual antidumping duty rate, Customs liquidates the entry as "no change."

[4] It is well established that bulletin notices satisfy the statutory notice of liquidation requirement, and thereby trigger the ninety-day period for filing a protest. *Juice Farms*, ___ Fed. Cir. (T) at ___, 68 F.3d at 1346; *Tropicana Prods., Inc. v. United States*, 8 Fed. Cir. (T) 145, 148–49, 909 F.2d 504, 506–07 (1990).

[5] In its complaint, JVC argues in the alternative that the Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(i), the Court's residual jurisdiction provision. Specifically, JVC asks the Court to exercise its residual jurisdiction because JVC failed to file a timely protest only because it relied upon the written suspension notices that it received from Customs. *See Compl.* at ¶¶ 13, 21, 22. Although JVC has not pursued this argument in either its response to Customs' motion or in its subsequent motion to strike and for leave to file a sur-reply, the Court has nevertheless considered and rejected it.

It is well established that jurisdiction under § 1581(i) is limited to those cases in which relief would otherwise be "manifestly inadequate." *Juice Farms*, ___ Fed. Cir. (T) at ___, 68 F.3d at 1346 (quoting *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, ___ Fed. Cir. (T) ___, ___, 18 F.3d 1581, 1584 (1994)); *accord Omni U.S.A., Inc. v. United States*, 6 Fed. Cir. (T) 99, 104, 840 F.2d 912, 915 (1988). Here, JVC's plea for jurisdiction under § 1581(i) is based on the same analysis that JVC uses to support its claim for equitable tolling and jurisdiction under § 1581(a). Importantly, the relief provided in another subsection of § 1581, *e.g.*, § 1581(a), does not become manifestly inadequate simply because a plaintiff has failed to properly invoke it. *Juice Farms*, ___ Fed. Cir. (T) at ___, 68 F.3d at 1346. In this case, had the Court accepted JVC's equitable tolling argument, it would have tolled the statutory filing period imposed by 19 U.S.C. § 1514(c)(3), and thereby exercised jurisdiction under 28 U.S.C. § 1581(a). Since, however, the Court rejects JVC's equitable tolling argument, it concludes that the protest was not timely filed and jurisdiction under § 1581(a) is thus unavailable. Furthermore, because JVC could have obtained judicial review by filing a timely protest, jurisdiction under § 1581(i) is also necessarily foreclosed. *Omni*, 6 Fed. Cir. at 104, 840 F.2d at 915.

filing deadline to pass.[6] Def.'s Reply at 8–9 (emphasis added). Because the facts positively demonstrate that Customs never engaged in any trickery, Customs argues that equitable tolling is unwarranted in this instance.

The Court has no occasion to rule on whether the facts of this case would justify tolling the ninety-day period because it finds that this period is not subject to equitable tolling. Accordingly, for the following reasons, the Court grants Customs' motion to dismiss.

I.

The doctrine of equitable tolling permits a plaintiff to avoid the bar of a statute of limitations if, "despite all due diligence, [the plaintiff] is unable to obtain essential information concerning the existence of [his or her] claim." *Weddel v. Secretary of Health and Human Servs.*, 100 F.3d 929, 931 (Fed. Cir. 1996) (citing *Cada*, 920 F.2d 446, 451 (7th Cir. 1990)).

Before the Supreme Court's decision in *Irwin*, 498 U.S. 89 (1990), any argument that the time period in 19 U.S.C. § 1514(c)(3) could be equitably tolled was clearly doomed. Courts viewed a timely filed protest as a jurisdictional prerequisite that could not be excused on equitable

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[6] Although ultimately unimportant in this case, the Court notes that throughout its reply brief Customs conflates the two independent doctrines of equitable tolling and equitable estoppel, implying that JVC improperly invokes the latter. While both doctrines allow a Court to toll filing deadlines in favor of a plaintiff, the circumstances in which they may be invoked differ. Equitable tolling does not require, as Customs suggests, a plaintiff to demonstrate that a prospective defendant has actively sought to prevent the plaintiff from suing in time (*e.g.*, by promising not to plead the statute of limitations). However, a plaintiff must make such a showing in order to invoke equitable estoppel. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450–51 (7th Cir. 1990) (contrasting the doctrine of equitable tolling with the doctrine of equitable estoppel). In contrast, equitable tolling is available so long as the plaintiff has exercised due diligence in pursuing his or her claim. *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) ("[W]hen the plea is equitable tolling rather than equitable estoppel, the defendant is innocent of the delay (though not of course the original wrong), so the plaintiff must use due diligence to be allowed to toll the statute of limitations; * * *."). Equitable tolling is the only relevant doctrine in this case: JVC essentially asks the Court to rule that due diligence does not require an importer to monitor for bulletin notices of liquidation for an entry when the importer is notified that liquidation of that entry is suspended. This is an argument based not on equitable estoppel principles, but on equitable tolling principles. Hence, whether Customs induced or tricked JVC into missing the filing deadline is not an issue in this case.

Furthermore, the Court is unpersuaded by Customs' related argument that the doctrine of equitable estoppel is wholly unavailable in suits against the United States when the United States acts in its sovereign capacity. *See* Def.'s Reply at 9–10. First, and perhaps most importantly, when, in *Irwin v. Department of Veteran's Affairs*, 498 U.S. 89 (1990), the Supreme Court created a rebuttable presumption that equitable tolling is a defense to missed filing deadlines in suits against the United States, the Supreme Court "explicitly (albeit in dictum) treat[ed] equitable estoppel as a form of equitable tolling." *Goodhand v. United States*, 40 F.3d 209, 213 (7th Cir. 1994) (citing *Irwin*, 498 U.S. at 96). In so doing, the Supreme Court implicitly treated equitable estoppel as a subset of equitable tolling. *Id.*; *RHI Holdings v. United States*, No. 97–5116, 1998 WL 217867, at * 3 (Fed. Cir. May 5, 1998). Thus, even if JVC's claim invoked the doctrine of equitable estoppel, the Court would still be required to review § 1514 in order to answer the threshold question, can courts toll the deadline for filing protests imposed by § 1514(c)(3)?

Finally, Customs' reliance on *Dazzle Mfg., Ltd. v. United States*, ___ CIT ___, 971 F. Supp. 594 (1997), for support of this proposition is misplaced. It is true that the *Dazzle* court rejected the plaintiff's argument that the court could excuse on equitable grounds plaintiff's failure to timely comply with 28 U.S.C. § 2637(a)(1994) by paying all duties, charges, or exactions owed before it commenced suit. *Id.* However, it did so in part because it construed 28 U.S.C. § 2637(a) as a jurisdictional requirement that "must be strictly construed since the court has no power to relax the statutory preconditions for waiver of sovereign immunity." *Id.*, ___ CIT at ___, 971 F. Supp. at 596 (citations omitted). While this Court does not quarrel with the result in *Dazzle*, it does not agree that statutory time limitations *a fortiori* foreclose the possibility of excuse on equitable grounds. *See Irwin*, 498 U.S. 89 (1990) (creating a rebuttable presumption that tolling principles are available defenses to missed filing deadlines in suits against the United States). Whether or not a specific statute contains an implied equitable tolling exception to statutory filing deadline depends upon the language, structure, and purpose of the statute. *See, e.g., United States v. Brockamp*, 117 S. Ct. 849 (1997). Here, the Court is faced with an entirely different statute, 19 U.S.C. § 1514, and accordingly assesses its language, structure, and purpose to determine if an equitable tolling exception to the ninety-day filing period is available.

grounds.[7] *See, e.g., United States v. Reliable Chem. Co.*, 66 C.C.P.A. 123, 605 F.2d 1179 (1979); *United States v. A.N. Deringer, Inc.*, 66 C.C.P.A. 50, 593 F.2d 1015 (1979); *United States v. Boe*, 64 C.C.P.A. 11, 543 F.2d 151 (1976); *Old Republic Ins. Co. v. United States*, 10 CIT 1, 625 F. Supp. 983 (1986). These decisions were based on well-settled principles of sovereign immunity: since the United States can only be sued if it explicitly waives its sovereign immunity, and the terms of a statute waiving sovereign immunity define the court's jurisdiction, it logically followed that the terms of the waiver, including any time limitations, must be strictly construed. *See, e.g., United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Boe*, 64 C.C.P.A. 11, 15–16, 543 F.2d 151, 154–55; *John S. Phipps v. United States*, 22 C.C.P.A. 595, 602 (1935) ("Whatever may be our views as to the equities of the case before us, our jurisdiction and the jurisdiction of the Customs Court is limited by statutory provisions, and such provisions must be observed.").

In *Irwin*, the Supreme Court relaxed the theory underlying these decisions by creating a rebuttable presumption that equitable tolling is available in suits against the United States. *Irwin*, 498 U.S. at 95–96. Importantly, however, this case did not signal a retreat from the basic premise of sovereign immunity, namely that "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Irwin*, 498 U.S. at 95 (internal quotations and citations omitted). Rather, *Irwin* represents an acknowledgment that "[o]nce Congress has made such a waiver, * * * making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. * * * Congress, of course, may provide otherwise if it wishes to do so." *Id.*

By creating a presumption in favor of equitable tolling, *Irwin* has changed how courts approach statutory filing periods. And thus, *Irwin* "seem[s] to have overruled or made irrelevant prior case law which

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[7] The decision in *Farrell Lines, Inc. v. United States*, 69 C.C.P.A. 1, 657 F.2d 1214 (1981), is the only noteworthy exception and the validity of its holding is, at best, unclear. In *Farrell Lines*, the plaintiff sought remission of duties that Customs assessed on repairs made on an American vessel while it was overseas. Customs liquidated the vessel repair entry without remitting the duties, and while plaintiff petitioned for administrative review of that decision, it never filed a timely protest of the liquidation. After Customs denied the petition, plaintiff protested the decision to deny the petition. When Customs denied the protest, plaintiff sued. The district court agreed with Customs and dismissed the case, concluding that it lacked subject-matter jurisdiction because plaintiff's protest was filed more than ninety-days after notice of the liquidation was given.

On appeal, a majority on the court rejected Customs' argument and tolled the ninety-day period for filing a protest. *Id.* In doing so, the majority initially noted that the applicable regulations confused both Customs and the plaintiff, and that both parties acted in good faith. It further reasoned that (1) treating the petition for review as something other than a protest would "elevate form over substance"; and (2) tolling the period for filing a protest was consistent with the purpose of 19 U.S.C. § 1466(a), which allows Customs to remit duties assessed on overseas repairs of American vessels.

Yet, importantly the majority failed to discuss either the purpose underlying the ninety-day period for filing a protest or its jurisdictional ramifications. *See Farrell Lines, Inc. v. United States*, 69 C.C.P.A. at 7, 10, 667 F.2d 1017, 1018 (Markey dissenting) ("In the dispositive portion of our opinion, it was held that the 90–day period for filing a protest to liquidation was tolled pending administrative review of [the] petition * * * for cancellation of duties. * * * That application of tolling, however, overlooked the jurisdictional aspect of the 90–day period * * *."). The decision in *Farrell Lines* has only been followed once. *See Sea-Land Serv., Inc. v. United States*, 17 CIT 61, 812 F. Supp. 222 (1993), *vacated as moot* 17 CIT 649, 829 F. Supp. 393 (1993). Generally, when faced with *Farrell Lines*, the court has either sought to clarify and limit its holding, or have found it inapposite. *See, e.g., Transmarine Navigation Corp. v. United States*, 7 CIT 42 (1984); *Wally Packaging v. United States*, 7 CIT 19, 578 F. Supp. 1408 (1984); *Noury Chem. Corp. v. United States*, 4 CIT 68 (1982).

sought to determine whether a particular limitations period could be tolled by determining whether the time limit was jurisdictional or not." *Oropallo v. United States*, 994 F.2d 25, 29 n.4 (1st Cir. 1993) (per curium); *accord Cedars-Sinai Medical Ctr. v. Qui Tam Realtor*, 125 F.3d 765, 770 (9th Cir. 1997) (internal quotations and citations omitted) ("[E]arlier statements that statutes of limitations are jurisdictional in nature have no continuing validity after the Court's decision in *Irwin*."); *Kanar v. United States*, 118 F.3d 527, 530 (7th Cir. 1997) (assessing whether a filing deadline is available in a tort suit by analyzing the "text and the functions of the [Federal Torts Claim Act], not * * * whether the definition of claim ought to be called 'jurisdictional'"). Hence, after *Irwin*, this Court cannot simply dismiss JVC's claim that the ninety-day period for filing protests should be tolled based on pre-*Irwin* precedent holding that the period is jurisdictional.[8]

Instead, the Court must assess whether reading an implied exception for equitable tolling into 19 U.S.C. § 1514 would unduly broaden the congressional waiver of sovereign immunity in 28 U.S.C. § 1581(a). *See, e.g., Brockamp*, 117 S. Ct. at 851 (holding that 26 U.S.C. § 6511 does not contain an implied exception for equitable tolling after answering "Irwin's negatively phrased question: Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?").

II.

In deciding whether the presumption that 19 U.S.C. § 1514 contains an implied exception for equitable tolling has been rebutted, the Court recognizes that it does not begin with a clean slate. In *Juice Farms*, ____ Fed. Cir. (T) ____, 68 F.3d 1344 (1995), the only Federal Circuit opinion that discusses how *Irwin* implicates § 1514, the court assumed, without deciding, that § 1514 allows courts to toll the ninety-day period. Specifically, the *Juice Farms* court noted that *Irwin* "sets forth standards for tolling a statute of limitations in suits against the Government." *Juice Farms*, ____ Fed. Cir. (T) at ____, 68 F.3d at 1346. Yet, the *Juice Farms* court refrained from engaging in a detailed analysis of *Irwin*, that is whether the language, structure, and purpose of § 1514 rebuts the existence of an implied exception for equitable tolling. Instead, the *Juice Farms* court summarily stated that courts can only toll statutory time limitations when the Government has induced or tricked the plaintiff into missing the filing deadline.[9] *Id.*

Based on this understanding of *Irwin*, the *Juice Farms* court rejected the plaintiff's tolling argument on its merits, concluding that the cir-

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[8] The Court notes that its decision to revisit the issue of equitable tolling in light of *Irwin* has not been shared by other opinions. *See, e.g., Guangxi Gitic Import and Export Corp. v. United States*, ___ CIT ___, 955 F. Supp. 1477 (1997) (citations omitted) (holding that time period for filing summons in action challenging an antidumping duty determination could not be tolled because the court was not empowered to imply equitable exceptions); *Feldspar Corp. v. United States*, 16 CIT 1067, 809 F. Supp. 971 (1992) (same). Although the Court does not presume to comment on the correctness of these decisions, it finds their use of pre-*Irwin* precedent and analysis troubling.

[9] Curiously, the *Juice Farms* court further observed that "*Irwin* also weighs [the plaintiff's] diligence in determining whether to toll a limitation period." *Juice Farms*, ____ Fed. Cir. (T) at ____, 68 F.3d at 1346. In so doing, the *Juice Farms* court fused the doctrines of equitable estoppel and equitable tolling. *See* discussion *supra* note 5.

cumstances did not excuse plaintiff's inaction.[10] *Juice Farms*, ___ Fed. Cir. (T) at ___, 68 F.3d at 1346. Thus, it affirmed the district court's decision to dismiss the plaintiff's claim for lack of subject-matter jurisdiction on a purely factual basis. *Id.*

By taking this approach, however, the Federal Circuit left unanswered the threshold question—does the language, structure, and purpose of § 1514 rebut the presumption that courts can toll the ninety-day period for filing protests imposed by § 1514(c)(3)? And, because the availability of equitable tolling is still an open question, the Court takes this opportunity to answer it.

III.

Since 28 U.S.C. § 1581(a) clearly waives the Government's immunity from suit, the Court focuses on 19 U.S.C. § 1514 and whether it either expressly or by fair implication provides for equitable tolling. In doing so, the Court may not enlarge the waiver beyond the purview of the statute and any ambiguities must be construed in favor of immunity. *United States v. Williams*, 514 U.S. 527, 531 (1995).

To discern congressional intent on this issue, the Court turns first to the language and structure of § 1514, which details the procedures for filing a protest and the ramifications for failing to do so in a timely manner. Section 1514(c)(3) sets forth the time limitation for filing a protest. As discussed earlier, it provides that "[a] protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before – [] notice of liquidation or reliquidation * * *." 19 U.S.C. § 1514(c)(3). Its language is fairly simple, and in other contexts, it could reasonably be interpreted as subsuming an implied exception for equitable tolling (indeed, an exception that cannot be rebutted).

Importantly, however, § 1514(c)(3) does not stand alone. Rather, it is explicitly incorporated into § 1514(a). Unlike its counterpart, § 1514(a) is a highly detailed provision containing language that excludes any inference that Congress intended courts to have the power to equitably toll the time period in § 1514(c)(3). It provides as follows:

> Except as provided in subsection (b) of this section [relating to determinations implicating the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement], section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties),

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[10] Like the instant case, *Juice Farms* involved entries subject to valid suspension orders that were prematurely liquidated by Customs. The *Juice Farms* plaintiff argued that it failed to timely protest the erroneous liquidations because it relied on suspension notices sent by Customs. And like JVC, the *Juice Farms* plaintiff asked the court to toll the period for filing protests based on *Irwin*. *Juice Farms*, ___ Fed. Cir. (T) at ___, 68 F.3d at 1345–46. The court rejected this argument, reasoning that

> the Government provided bulletin notices of Customs' admittedly premature liquidations. Juice Farms bore the burden of examining those notices and protesting within the statutory time limits. Juice Farms could have challenged the legality of the liquidations by timely filing a protest under 19 U.S.C. § 1514(a). Juice Farms' own lack of diligence caused its untimely filing.

Id., ___ Fed. Cir. (T) at ___, 68 F.3d at 1346.

Because the facts of this case so closely parallel the facts of *Juice Farms*, even if the Court had determined that § 1514 permits equitable tolling, it still would have been compelled to reject JVC's claim on the merits. Thus, under either approach, the Court would dismiss this action for lack of subject-matter jurisdiction.

> and section 1520 of this title (relating to refunds and errors), decisions of the Customs Service, including the *legality* of all orders and findings entering into the same, as to–
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> (2) the classification and rate and amount of duties chargeable;
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> * * * * * * *
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> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
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> * * * * * * *
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> shall be *final and conclusive* upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section * * *.

19 U.S.C. § 1514(a) (emphasis added).

Section 1514(a) cannot be read to include, either explicitly or implicitly, an equitable tolling exception. The words "final and conclusive" are hardly ambiguous: final means "not to be altered or undone," and conclusive means "so irrefutable as to end all uncertainty or question." *Webster's Third New International Dictionary of The English Language Unabridged* 851, 471 (1986). Their meaning would be eviscerated if courts could review the merits of Customs' decisions that were not timely protested whenever they determined that equity demanded it.

The Court also finds the use of the word "legality" in § 1514(a) significant. It demonstrates Congress contemplated that some patently incorrect Customs' decisions would escape judicial review because it prevents a plaintiff from escaping the timely protest requirement by arguing that Customs' decision is legally suspect. This, in turn, suggests that Congress deliberately chose to accept the occasional inequitable result in order to foster greater certainty, predictability, and repose.

In addition, § 1514(a) sets forth explicit exceptions to the ninety-day limit for filing protests that notably does not include an open-ended provision for equitable tolling. *See* 19 U.S.C. § 1514(a) (establishing different procedures when a decision implicates § 1514(b); § 1501, voluntary reliquidations; § 1516, petitions from domestic interested parties; or § 1520, refunds and errors). The exceptions are very specific, highly detailed, and well-developed. *See, e.g.*, § 1501 (within ninety-days of the original liquidation, Customs may reliquidate an entry on its own initiative); § 1516 (a domestic interested party has thirty days to notify Customs that it wants to challenge how Customs liquidated designated imported merchandise). Indeed, one of the exceptions, 19 U.S.C. § 1520, squarely addresses JVC's situation.

Section 1520 authorizes Customs to reliquidate an entry, refunding excess deposits even if an importer failed to file a valid protest when reliquidation corrects

> a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, not amounting to an error in the construction of the law, adverse to the importer and manifest from the record or established by documen-

> tary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of the liquidation or exaction; * * *.

19 U.S.C. § 1520(c). If a party in JVC's position timely (*i.e.*, within one year after the date of liquidation) notifies Customs of its mistake and Customs refuses to reliquidate the entry, the party can then protest that refusal under § 1514. *Omni*, 6 Fed. Cir. (T) at 101, 840 F.2d at 913. Thus, once the premature liquidations occurred, JVC had either ninety-days to file a timely protest or one year to notify Customs of its mistake. JVC did neither.

By enacting § 1520, Congress recognized a limited set of circumstances in which parties like JVC have two bites at the proverbial apple. In so doing, Congress spoke specifically on when the ninety-day period for filing protests may be relaxed, and for how long. Against this backdrop, it would be incongruous for this Court to read an additional exception into § 1514, especially one so nebulous as equitable tolling.

Subsequent acts by Congress further underscore this point. In various situations, Congress itself has determined that circumstances warrant tolling, or even waiving, the time period for filing protests. In these situations, Congress has carved out specific statutory exceptions to § 1514. *See, e.g.*, S. Rep. No. 104–393, at 8 (1996), 1996 U.S.C.C.A.N. 4036, 4043 (directing Customs to reliquidate certain entries of color televisions that were subject to a suspension order and prematurely liquidated even though importer failed to file a timely protest); S. Rep. No. 104–393, at 27, 1996 U.S.C.C.A.N. at 4062 (same involving certain entries of frozen concentrated orange juice); S. Rep. No. 104–393, at 30, 1996 U.S.C.C.A.N. at 4065 (same involving certain entries of live swine); S. Rep. No. 104–393, at 14, 1996 U.S.C.C.A.N. at 4049 (directing Customs to treat re-entry of four warp knitting machines as duty-free even though a timely protest was not filed); H.R. Rep. No. 102–634, at 91 (1992) (tolling the time for filing a protest for twenty-seven entries of synthetic filament fibers); H.R. Conf. Rep. No. 101–650, at 75 (1990) (tolling ninety-day period for filing protests for two entries); S. Rep. No. 98–308, at 33 (1983) (directing Customs to reliquidate two entries of scientific equipment even though no timely protest was filed). These acts demonstrate that JVC's remedy lies not with the courts, but with Congress.

Finally the Court notes that its finding is fully consistent with the underlying subject matter of the statute, the collection of tariffs and duties. The Customs Service is the second largest tax collection agency in the Government. In 1992 alone, Customs collected $20.2 billion in revenue. *See* H.R. Rep. No. 103–868 Part 1, at 2 (1994). In this respect, the Court finds the reasoning of the Supreme Court in *Brockamp*, 117 S. Ct. 849, both relevant and persuasive. In *Brockamp*, the Supreme Court held

that courts lacked the power to toll the time limitations for filing tax refund claims, reasoning in part that

> [t]he IRS processes more than 200 million tax returns each year. It issues more than 90 million refunds. To read an 'equitable tolling' exception into §6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which upon close inspection might turn out to lack sufficient equitable justification. The nature and potential magnitude of the administrative problem suggests that Congress decided to pay the price of occasional unfairness in individual cases * * * in order to maintain a more workable tax enforcement system. At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitation periods, rather than to delegate to the courts a generalized power to do so whenever a court concludes that equity so requires.

117 S. Ct. at 852 (citations omitted).

The situation here is analogous. Customs assesses and collects duties, taxes, and fees on imported merchandise; inspects targeted entries for compliance with United States trade laws and trade agreements; determines whether imported merchandise is admissible; and compiles trade statistics. *See* GAO Rep. No. GAO/AIMD–94–119 (June 15, 1994). In 1993, the volume of imported merchandise totaled approximately $550 billion requiring Customs to process over 27 million entries. *Id.* In this context, the Court is reticent to read an equitable tolling exception into § 1514. Similar to the Court in *Brockamp*, this Court is concerned that such an open-ended exception would disrupt the administrative process and render the system for collecting tariffs and duties less workable.

Thus, the presumption that the ninety-day period for filing a protest imposed by 19 U.S.C. § 1514(3) contains an equitable tolling exception has been rebutted by the language, structure, and purpose of 19 U.S.C. § 1514. The Court is therefore without jurisdiction to review JVC's admittedly untimely protest.

CONCLUSION

For the foregoing reasons, the Court grants Customs' motion to dismiss for lack of subject-matter jurisdiction.

(Slip Op. 98–98)

PRIMAL LITE, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 96–08–01934

[Plaintiff's motion for summary judgment granted on the ground that imported lighting sets were not used for Christmas trees and were therefore not properly classified in a provision for lighting sets of a kind used for Christmas trees.]

(Decided on July 7, 1998)

Law Offices of George R. Tuttle *(Carl D. Cammarata)*, for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office; Civil Division, Dept. of Justice, Commerce Litigation Branch *(Mikki Graves Walser)*, and Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Mitra Hormozi)* for defendant.

OPINION AND ORDER

WATSON, *Senior Judge:* The Court has before it cross-motions for summary judgment with respect to the tariff classification of imported lighting sets. The importations consist of 14–foot long lengths of wire set with 10 light bulbs and with two extra light bulbs attached. Included for fitting over the lights are translucent plastic shapes in the form of such objects as fruits, vegetables, hearts, rearing horses, guitars and American flags. They were classified as "lighting sets of a kind used for Christmas trees" in Subheading 9405.30.00 of the Harmonized Tariff Schedules of the United States ("HTSUS"). Plaintiff claims they are properly classifiable as other electric lamps and lighting fittings under Subheading 9405.40.80, HTSUS. Both competing provisions come under Heading 9405 for "lamps and lighting fittings" not elsewhere specified or included. The relevant tariff provisions are as follows:

Chapter 94, Heading 9405:

> Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed source, and parts thereof not elsewhere specified or included:
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> * * * * * * *
>
> 9405.30.00 Lighting sets of a kind used for Christmas trees
>
> * * * * * * *
>
> 9405.40 Other electric lamps and lighting fittings:
>
> * * * * * * *
>
> 9405.40.80 Other
>
> * * * * * * *

There are no material issues of fact in this case. The uncontradicted declaration of the plaintiff's president establishes that these lights are used for indoor and outdoor lighting decoration and illumination purposes unrelated to Christmas trees or the Christmas holiday.

It is the government's position that the actual use of these importations is irrelevant to the classification. The government contends that

the Subheading 9405.30.00 provides for "string lighting" sets of all kinds because, whether or not they are actually used for Christmas trees, they are lighting sets "of a kind used for" Christmas trees.

The Court does not agree with the government's interpretation of the phrase "of a kind used for." That phrase is nothing more than an amplification or equivalent of the basic term "used for." *Group Italglass S.A. v. United States*, 17 CIT 226 (1993). It incorporates into the HTSUS language of "use" classification the long-established principle that it is the use of the class or kind of goods being imported that is controlling, rather than the specific use to which the importation itself is put. The phrase does not mean that "similar" merchandise is included in a given tariff provision. Stated differently, the provision in which this merchandise was classified is, on its face, a provision for lighting sets used for Christmas trees. Inasmuch as the importations are not used for Christmas trees they do not fall within the plain original meaning of the statutory language. It would take a special manifestation of legislative intention to bring them into this provision, either by specifically including "similar" articles or possibly, by leaving unmistakable indications in the legislative history. However, when the legislative history is examined, no such intention is found. In fact, the clearest legislative history shows a contrary intention.

Before the Harmonized Tariff Schedules of the United States, there was a provision for Christmas tree lighting sets "and wiring sets similar thereto" in item 688.10 of the Tariff Schedules of the United States ("TSUS"). The HTSUS replaced that provision with one covering lighting sets "of a kind used for Christmas trees." That was a definite narrowing of the language and a clear exclusion of similar lighting sets from classification in the same provision as Christmas tree lighting sets. It is "hard" evidence of what the legislators did. In the opinion of the Court, it is far more revealing than the material advanced by the government from the Explanatory Notes.

The Explanatory Notes can be helpful in arriving at an understanding of the provisions of the HTSUS. As the official interpretation of the scope of the Harmonized Commodity Description and Coding System as formulated by the Customs Cooperation Council, and as a basis for the language of the HTSUS, these notes can be revealing, but they must be used with care. In this case they do not relate directly to the classification language under consideration. The government argues that the explanatory note under Heading 9405 states that the heading covers, inter alia, "electrical garlands (including those fitted with fancy lamps for carnival or entertainment purposes, or for decorated Christmas trees)." But that note does not speak directly to the HTSUS subheading for Christmas tree lighting in which the importations were classified. That piece of legislative history merely indicates that the general class of lights on strings should be covered under Heading 9405. It does not preclude the further differentiation of those lights under the main heading and it does not contradict the making of a distinct provision for Christ-

mas tree lights. It certainly did not operate to create a new class of items in the HTSUS, to be designated as "electric garlands." That general term was plainly not carried over into the HTSUS.

The government stresses the work of the nomenclature committee of the Customs Cooperation Council in assigning "electric garland of all kinds" to Heading 9405 with the express intention of avoiding having to distinguish between electric garlands for Christmas trees and other electric garlands. This argument would be persuasive if the language of "electric garlands" had been continued into the HTSUS but, in fact, as was noted earlier, what was done in the HTSUS was distinctly different. Language that covered "Christmas-tree lighting sets * * * and wiring sets similar thereto" under the Tariff Schedules of the United States became "lighting sets of a kind used for Christmas trees." In the opinion of the Court, the plain and unambiguous effect of this change was to create a provision entirely devoted to Christmas tree lighting sets and to exclude therefrom lighting sets of a similar type. The Explanatory Notes cannot be used to introduce ambiguity into this plain legislative alteration. They certainly cannot be used to transform the plain statutory language covering Christmas tree lights into a comprehensive new provision for "electrical garlands."

The use of the term "of a kind" is nothing more than a statement of the traditional standard for classifying importation by their use, namely, that it need not necessarily be the actual use of the importation but is the use of the kind of merchandise to which the importation belongs. In other words, if an importer could prove that its importation of Christmas tree lights was being used for purposes unrelated to Christmas that would have no bearing on the classification. Those lights would be "of a kind used for Christmas trees" within the meaning of this provision. But that focus on the use of the "kind" rather than the use of the specific importation does not broaden a "use" classification to include a separate class of similar merchandise not used for the same purpose. In this case, the provision for lighting sets used for Christmas trees has not been transformed into a provision for lighting sets used for other purposes.

It follows that the imported lighting sets are "other" electric lamps and light fittings, that is to say, other than those specified in the Subheading 9405.05 that precedes Subheading 9405.40.80. For this reason, plaintiff's motion for summary judgment will be granted.

(Slip Op. 98–99)

STC CORP., STC OF AMERICA, INC. AND AMERICAN TAPE CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND E.I. DUPONT DE NEMOURS & CO., HOECHST CELANESE CORP., AND ICI AMERICAS INC., DEFENDANT-INTERVENORS

Court No. 95–09–01181

(Dated July 8, 1998)

JUDGMENT

TSOUCALAS, *Senior Judge:* The Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand, STC Corp. v. United States, Court No. 95–09–01181, Slip Op. 97–173 (December 15, 1997)* ("Remand Results"), and Commerce having complied with the Court's Remand, it is hereby

ORDERED that the Remand Results are affirmed in their entirety; and it is further

ORDERED that this case is dismissed.

(Slip Op. 98–100)

NORTH AMERICAN PROCESSING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–11–00769

Defendant moves for rehearing, modification, and/or reconsideration pursuant to U.S. CIT R. 59(a) of this Court's order denying defendant's motion for summary judgment. *See North American Processing Co. v. United States*, Slip Op. 98–13 (CIT Feb. 19, 1998). Defendant contends it is entitled to judgment as a matter of law because the United States Customs Service properly classified the merchandise at issue under subheading 0202.30.60 of the Harmonized Tariff Schedule of the United States. Defendant alternatively moves *in limine* to preclude plaintiff from introducing at trial evidence demonstrating or relating to whether the imported merchandise consists of beef with fat adhering to it, fat with beef adhering to it, the degree to which the fat adheres to the beef, or the degree to which the beef adheres to the fat. Defendant also seeks to preclude introducing at trial evidence regarding labeling on the imported merchandise's packaging and expert witness testimony, contending allowing such evidence at trial is unduly prejudicial. Defendant also moves for oral argument.

Plaintiff opposes defendant's motion for rehearing, modification, and/or reconsideration, arguing genuine issues of material fact exist which preclude the Court from granting the motion. Plaintiff further argues the Court should not grant defendant's motion *in limine* because plaintiff did not mislead the government in discovery and defendant would not be unduly prejudiced if the Court were to allow evidence defendant seeks to exclude. Plaintiff also asserts oral argument is unnecessary.

Held: The Court's initial finding that this matter raises genuine issues of material fact is supported by the record, and thus the Court finds its initial determination is not manifestly erroneous. Accordingly, the Court denies defendant's motion for rehearing, modification, and/or reconsideration. The Court additionally finds evidence sought to be excluded by defendant through its motion in limine is critical to the resolution of issues at trial, and its inclusion would not unduly prejudice the defendant. Thus, the Court denies defendant's motion in limine. Defendant's request for oral argument is also denied.

(Dated July 13, 1998)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr. and *Christopher E. Pey),* New York, NY, for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara Silver Williams); Ed Maurer* and *Mitra Hormosi,* Office of the Assistant Chief Counsel for International Trade Litigation, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* The United States (defendant or government) moves for rehearing, modification, and/or reconsideration pursuant to U.S. CIT R. 59(a) of this Court's order denying defendant's motion for summary judgment. *See North American Processing Co. v. United States*, Slip Op. 98–13 (CIT Feb. 19, 1998). In the alternative, defendant moves *in limine* to exclude certain evidence and additionally moves for oral argument. North American Processing Company (plaintiff or North American) opposes the government's motions, contending, among other things, sufficient evidence exists to support the Court's denial of defendant's motion for summary judgment. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).

BACKGROUND

On October 14, 1992, North American entered the merchandise at issue through the port of San Francisco. The merchandise consisted of beef trimmings packaged such that the entire package consisted of 35% lean meat and 65% fat. The one entry at issue was entered under subheading 1502.00.00, Harmonized Tariff Schedule of the United States (HTSUS), as "fats of bovine animals * * *," dutiable at a rate of 0.95¢/kg. The merchandise was liquidated as "no change" under this subheading on February 5, 1993, but was later reliquidated by United States Customs Service (Customs) on February 26, 1993, under subheading 0202.30.60, HTSUS, as "meat of bovine animals, frozen, boneless, other," dutiable at a rate of 4.4¢/kg.

On May 26, 1993, plaintiff filed a protest, pursuant to 19 U.S.C. § 1514(c) (1988), challenging Customs' reliquidation of the merchandise under subheading 0202.30.60, HTSUS. Customs denied this protest on August 4, 1993, and plaintiff timely filed this action. On March 24, 1997, defendant filed a motion for summary judgment. Defendant's motion was denied in February 1998 because "[t]he parties do not agree on the degree to which the fat adheres to the meat, and this issue will require a factual finding by the Court." *North American Processing Co.*,

at 5 (footnote omitted). This Court further determined the issue of how packaging in which the merchandise was imported was labeled remained in dispute. Presently before the Court are defendant's timely filed motion for rehearing, modification, and/or reconsideration, motion *in limine*, and motion for oral argument.

CONTENTIONS OF THE PARTIES

A. *Defendant*

Defendant moves for rehearing, modification, and/or reconsideration, contending the Court erred in issuing its order denying defendant's motion for summary judgment. *See North American Processing Co.*, Slip Op. 98–13. Defendant contends it is entitled to judgment as a matter of law because Customs properly classified the merchandise at issue under subheading 0202.30.60 of the HTSUS, and plaintiff failed to present factual evidence sufficient to negate that classification. Defendant further contends the Court erred in denying defendant's motion for summary judgment based on its finding that the labeling appearing on the merchandise's packaging was an issue of fact for trial, arguing the issue of labeling is not a material fact. In the alternative, defendant seeks a motion *in limine* to preclude plaintiff from introducing evidence or expert witnesses on the issues of the physical nature and description of the beef and the labeling of packages, contending such evidence unduly prejudices the defendant.

B. *Plaintiff*

North American opposes defendant's motions, arguing genuine issues of material fact exist in this matter which preclude the Court from granting defendant's motions. Plaintiff's central contention is that it presented evidence sufficient to demonstrate genuine issues of material fact exist regarding the physical characterization of the merchandise at issue and how boxes in which the merchandise was imported were labeled. For substantially the same reasons, plaintiff argues defendant's motion *in limine* is groundless and oral argument unnecessary.

STANDARD OF REVIEW

The grant of a defendant's motion for rehearing, modification, and/or reconsideration under U.S. CIT R. 59(a) is within the sound discretion of the court. *See Kerr-McGee Chemical Corp. v. United States*, 14 CIT 582, 583 (1990). A motion for reconsideration will not be granted unless the Court's original decision is manifestly erroneous.[1] *See Saint Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 984, 807 F. Supp. 792 (1992)

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[1] Under traditional standards, a motion for reconsideration was granted only upon the identification of a mistake in law or fact, or upon the discovery of material evidence that was previously unavailable. *See* 12 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 59.30[5][a] n.10 (3rd ed. 1998); *cf. Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1562 n.6 (Fed. Cir. 1994) (citing *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990) (stating the purpose of a motion for reconsideration was to correct for errors of law or fact or to present newly discovered evidence) (quotation and citation omitted)).

(applying a "manifestly erroneous" standard to a motion for rehearing and reconsideration).[2]

Likewise, a decision concerning evidentiary matters is within the sound discretion of the trial court. *See, e.g., Curtin v. Office of Personnel Management,* 846 F.2d 1373, 1378 (Fed. Cir. 1988). When appropriate, a motion *in limine* to exclude certain evidence is a favored procedural device granted to prevent a party from encumbering the record with irrelevant, immaterial, or cumulative matters before trial. *See, e.g., Baskett v. United States*, 2 Cl. Ct. 356, 367–68 (1983).

Discussion

In *North American Processing Co.*, this Court found genuine issues of material fact existed warranting trial. Defendant makes no arguments that convince the Court its decision was manifestly erroneous. Accordingly, this Court denies the defendant's motion for rehearing, modification, and/or reconsideration. Moreover, because the evidence sought to be excluded by defendant in its motion *in limine* is the very evidence needed to resolve the issues at trial and because the Court finds defendant would not be unduly prejudiced by allowing plaintiff to introduce such evidence, the Court also denies defendant's motion *in limine*.

A. *Physical Nature and Description of Imported Merchandise*

In its motion papers, defendant contends North American possessed no evidence on the issue of whether the imported merchandise consisted of beef with fat adhering to it. (*See* Memo. in Supp. of Def.'s Motion for Rehr'g, Modif'n, and/or Reconsid'n (Def.'s Memo.) at 8–9 (citing, *e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (finding moving party entitled to judgment as a matter of law where nonmoving party failed to provide evidence concerning essential element of his case)).) To support its contention, defendant focuses on North American's response in discovery that it "'does not know, and takes no position on the issue of whether the fat adheres to the [meat], or vice versa'" and "'[p]laintiff cannot state whether any or all of the fat adheres to the [meat], or the [meat] adheres to the fat, or the two adhere to each other.'" (Pl.'s First Resp. to Def.'s Third Set of Interrog., *reprinted in* Def.'s Memo., Ex. 2 at 3.) Defendant argues these statements indicate North American has no evidence to contradict the government's showing fat adheres to beef, and thus defendant was entitled to summary judgment.

Evidence provided by plaintiff in the form of affidavits and responses to defendant's interrogatories refutes to some degree defendant's al-

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[2] Other grounds for granting a motion for reconsideration include to present newly discovered or previously unavailable evidence, to prevent manifest injustice, or to correct for changes in controlling law. *See* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2810.1 (2d ed. 1995). Because defendant does not appear to raise any of these additional grounds in its motion for rehearing, modification, and/or reconsideration, none will be considered in this opinion.

legation that fat adheres to the meat and thus raises a material issue.[3] While defendant is correct plaintiff stated it "'does not know, and takes no position on the issue of whether the fat adheres to the [meat] * * *'" (*id.*), plaintiff also submitted evidence stating "[t]he imported merchandise consisted of a mixture of fat trimmings which incorporated intermingled fat and meat, *some of which adhered to each other.*" (Affidavit of Rod McNally, attached to Pl.'s Memo. in Opp'n to Def.'s Motion for Summ. J. at 2 (emphasis added).) Such evidence challenges the government's assertion that fat adheres to the meat.

This case originally came before the Court on defendant's motion for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." U.S. CIT R. 56(d). "The Court will deny summary judgment if the parties present a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l., Inc. v. United States,* 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (quotation and citation omitted).

As stated in the earlier decision and reconfirmed upon further consideration here, the record indicates the parties do not agree on whether or to what extent fat adheres to the meat and thus raises a genuine issue of material fact requiring trial. Moreover, the Court finds a reasonable trier of fact could determine pieces of fat do not adhere to the meat based on evidence provided by plaintiff. As defendant fails to invite the Court's attention to any error, the Court finds its denial of defendant's motion for summary judgment was not manifestly erroneous. Accordingly, the Court denies defendant's motion for rehearing, modification, and/or reconsideration on this issue.[4]

B. *Labeling on Packaging of the Imported Merchandise*

Next, defendant argues the Court erred in finding that the issue of labeling on packaging should prevent summary judgment.[5] First, defen-

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[3] The issue of whether fat adheres to the meat is material to this Court's determination of whether the merchandise properly is classified under heading 0202, HTSUS, as "meat of bovine animals, frozen, boneless, other," or under heading 1502, HTSUS, as "fats of bovine animals." As defendant's papers note, the General Explanatory Notes to Chapter 2 of the HTSUS provide, "[a]nimal fat presented separately is excluded * * * but fat presented in the carcass or adhering to meat is treated as forming part of the meat." (Memo. in Supp. of Def.'s Motion for Summ. J. at 5 (quoting Harmonized Commodity Description and Coding System, Chapter 2, General Notes (1986)).)

[4] The government also argues its classification is presumed to be correct pursuant to 28 U.S.C. § 2639(a) and that plaintiff has the burden of overcoming the statutory presumption by a preponderance of the evidence. (*See* Def.'s Memo. in Supp. of Def.'s Motion for Rehr'g, Modif'n, and/or Reconsid'n at 12 (quoting *Baxter Healthcare Corp. of America v. United States*, Slip Op. 98–16 at 9 (CIT Feb. 24, 1998)).) As the issue at bar concerns only whether a genuine issue of material fact exists, it is unnecessary to address the presumption at this time. Whether plaintiff can successfully overcome the statutory deference owed to Customs remains to be determined at trial as more evidence must be examined to determine whether the imported merchandise is properly classified as "meat of bovine animals, frozen, boneless, other" or as "fats of bovine animals." *See generally E.M. Chemicals v. United States*, 923 F. Supp. 202, 208 (CIT 1996) (finding it unnecessary to apply presumption of correctness on summary judgment motion concerning whether genuine issue of material fact exists); *cf. Universal Electronics, Inc. v. United States*, 112 F.3d 488, 493 (Fed. Cir. 1997) (stating presumption of correctness relates to presentation of evidence and has force only as to factual components of a particular decision).

[5] In the first motion, defendant contended labeling on the packaging of substantially similar merchandise described the contents as "Boneless Beef." (*See* Def.'s Stmt. Of Mater. Facts Not in Issue at 2.) Plaintiff, however, asserted the merchandise was imported in boxes marked "A-FAT-TRIM," an abbreviation for Type-A Fat Trimmings. (*See* Pl.'s Memo. in Opp'n to Def.'s Motion for Summ. J. (Pl.'s Memo.) at 9.)

dant argues the issue of labeling is not an issue of "material fact" because the resolution of the issue will not affect the outcome of the suit. This argument is based on defendant's assertion there is no genuine issue regarding the physical nature and description of the imported merchandise. Second, defendant contends even if the issue were relevant, North American failed to identify any evidence to support its claim, and thus the motion for summary judgment should have been granted.

The Court finds defendant's argument unpersuasive. First, as articulated in the initial decision, while not controlling, invoice and packaging descriptions of merchandise are evidence which can aid the Court in reaching the proper classification at trial. *See, e.g., Peterson Electro Musical Products v. United States*, 7 CIT 293, 295 (1984) (stating invoices are evidence of what the parties, and presumably the commercial world, consider the merchandise to be). As the Court has found a genuine issue of material fact exists regarding whether fat adheres to the meat, the labeling of the packaged merchandise may be relevant to the Court's determination of the merchandise's proper classification. Second, the Court finds plaintiff submitted sufficient evidence to support this allegation based on the statements provided in the McNally affidavit.[6] As defendant fails to invite the Court's attention to any error, the denial of summary judgment on the issue of labeling is not manifestly erroneous. The Court denies defendant's motion for rehearing, modification, and/or reconsideration on this issue.

C. *Motion in Limine*

Finally, defendant moves *in limine* to preclude plaintiff from introducing evidence demonstrating or relating to whether the imported merchandise consists of beef with fat adhering to it, fat with beef adhering to it, the degree to which the fat adheres to the beef, or the degree to which the beef adheres to the fat, arguing such evidence would unduly prejudice the government as its litigation strategy was based on North American's discovery responses. Defendant also seeks to preclude evidence on labeling of the imported merchandise's packaging and expert witness testimony substantially for the same reasons.

A decision concerning evidentiary matters is within the sound discretion of the trial court. *See, e.g., Curtin*, 846 F.2d at 1378. A motion *in limine* to exclude evidence is favored where, among other things, the exclusion would prevent a party from encumbering the record with irrelevant, immaterial, or cumulative matters. *See Baskett*, 2 Cl. Ct. at 367–68. As evidence concerning the physical nature and description of the imported merchandise and the labeling on packaging of the imported merchandise is critical for resolving genuine issues of material fact at bar, the evidence is not "irrelevant, immaterial, or cumulative" and should not be excluded.

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[6] For example, McNally stated the boxes in which the imported merchandise was imported "were marked 'A-FAT-TRIM.'" The term "A-FAT-TRIM" is an abbreviation for "'Type A Fat Trimmings.'" (*See* Affidavit of Rod McNally, attached to Pl.'s Memo. at 2.)

Moreover, plaintiff's evidence on adhesion and labeling matters does not appear to unduly prejudice the government. First, the government's failure to conduct further discovery regarding the physical nature and description of the imported merchandise appears to be due to trial strategy rather than any alleged malfeasance by the plaintiff. (*See, e.g.*, Def.'s Memo. at 22–23.) Second, as plaintiff claims it has no intention to call expert witnesses, (*see* Memo. in Supp. of Pl.'s Memo. in Opp'n to Def.'s Motion for Rehr'g, Modif'n, and/or Reconsid'n at 22), its failure to identify witnesses during discovery did not mislead the government.[7] Further, the defendant may request an extension of time for discovery to investigate any outstanding issues as needed. Thus, it does not appear defendant would be unduly prejudiced by the introduction at trial of the evidence it seeks to exclude. Accordingly, defendant's motion *in limine* is denied. Defendant's motion for oral argument is also denied.

CONCLUSION

For the reasons stated above, the Court finds this matter presents genuine issues of material fact requiring trial. Thus, the Court's denial of defendant's motion for summary judgment was not manifestly erroneous. Accordingly, the Court denies defendant's motion for rehearing, modification, and/or reconsideration. Additionally, because evidence sought to be excluded by defendant in its motion *in limine* is critical for resolving issues at trial and because the Court finds defendant would not be unduly prejudiced by the inclusion of such evidence, the Court denies defendant's motion *in limine*. Finally, the Court also denies defendant's motion for oral argument.

[7] If, subsequent to this decision, plaintiff decides to call an expert witness, it must, in accordance with the Rules of the Court, timely identify the witness to the government.

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